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# Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence

Aviva A. Orenstein

*Indiana University Maurer School of Law*, [aorenste@indiana.edu](mailto:aorenste@indiana.edu)

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# Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence

AVIVA ORENSTEIN\*

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\* Professor of Law, Maurer School of Law, Indiana University. Fred Zacharias started teaching law about the same time I started learning it. We were both at Cornell Law School, and I regret that I never took a course with him. (He did, however, judge a moot court competition in which my team lost—a testament to his good judgment.) When I started teaching Professional Responsibility, I regularly relied on Fred's vast and impressive contribution to scholarship on the legal profession. I feel fortunate that I was able to benefit from Fred's work and to know him as a colleague and a friend. I would like to thank Barbara O'Brien, Brandon Garrett, Bruce Green, Joseph Hoffmann, Sylvia Orenstein, Lauren Robel, John Steele, and David Szonyi for their comments on earlier drafts. Thanks to Judith Reckelhoff for able research assistance and to Amanda McKinney for secretarial and moral support. I dedicate this Article to my mother, Sylvia Orenstein, a brilliant public defender and a clear-eyed realist, who has led by example in law and in life.

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## I. INTRODUCTION

As this memorial volume illustrates, Fred Zacharias wrote insightfully on many aspects of the legal profession, covering a wide range of ethical topics and analyzing many aspects of lawyers' work. He was interested in the lives of lawyers and believed they owed a duty to society beyond an exclusive focus on individual clients' interests.

This Article develops a question that intrigued Fred: prosecutors' duties postconviction to prisoners who might be innocent. Although Fred wrote about a panoply of questions that arise regarding the prosecutor's duty to "do justice"<sup>1</sup> after conviction, this Article will address one specific area of concern: how and why prosecutors resist allowing DNA testing and, more startlingly, deny the obvious implications of DNA evidence when that evidence exonerates the convicted.

As Fred himself noted, there may be legitimate reasons for prosecutors to deny access to DNA to every prisoner who requests it. Less easy to understand, however, are the confabulations and attenuated scenarios some prosecutors posit to argue that the accused is guilty despite DNA evidence that demonstrates no link to the crime—and sometimes incriminates a known offender. This Article argues that the psychological concept of denial goes a long way in explaining prosecutors' conduct. Rather than portraying prosecutors as megalomaniacal abusers of the adversary system who will protect their win-loss ratios at any cost, a theory of denial posits that they simply cannot face the fact of a wrongful conviction or its implications for the entire system of justice. Ironically, a prosecutor's desire to do justice and the prosecutor's self-image as a champion of justice render the fact of wrongful conviction particularly painful. As a result, some prosecutors go to incredible

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1. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2010).

lengths to deny the obvious rather than face the fact that the justice system failed and they may have contributed to that failure.

Part II of this Article briefly summarizes two of Fred's major articles on the subject of prosecutorial ethics. Part III documents the problem of postconviction DNA exonerations and prosecutors' varied reactions. These reactions encompass everything from the prompt release of prisoners to the adamant refusal to acknowledge the relevance of the evidence. Part IV attempts to add to the current explanations of why some prosecutors refuse to acknowledge errors even after DNA indicates a wrongful conviction. This Part explores the role of denial, in addition to traditional explanations involving prosecutorial self-interest, incentive structure, and cognitive biases. Part V examines the bigger picture of denial, looking at how refusal to accept DNA exonerations may mask deeper concerns about the criminal justice system. Finally, Part VI draws on these insights about prosecutorial denial to examine structural solutions to the urgent problems posed by postconviction innocence, including possible changes to ethical codes.

## II. FRED ZACHARIAS ON PROSECUTORS' ROLE IN SERVING JUSTICE AFTER CONVICTIONS

### A. *Can Prosecutors Do Justice?*

Fred's seminal article, written twenty years ago, asked *Can Prosecutors Do Justice?*<sup>2</sup> In this highly influential piece,<sup>3</sup> he explored the unique position of prosecutors, elucidating the tension between their adversarial roles to be zealous advocates for the state and their duty to do justice—a duty not imposed on the defense.<sup>4</sup>

In *Can Prosecutors Do Justice?*, Fred fleshed out the “old saw that prosecutors have both an ethical and a legal obligation to ‘do justice.’”<sup>5</sup> He questioned the utility of this vague ethical injunction, noting the

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2. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

3. A Westlaw search in February 2011 revealed over 200 citations in court opinions, law review articles, and legal briefs to *Can Prosecutors Do Justice?*

4. See Zacharias, *supra* note 2, at 57 (“The prosecutor is simultaneously responsible for the community’s protection, victims’ desire for vengeance, defendants’ entitlement to a fair opportunity for vindication, and the state’s need for a criminal justice system that is efficient and appears fair.” (footnotes omitted)).

5. Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 173 (2005) (footnotes omitted).

failure of the case law, rule writers, and the academy to define the prosecutor's obligations.<sup>6</sup> Fred expressed skepticism about a "high-minded but overly general 'justice' rule" and instead argued for specific ethical directives to guide ethical rulemaking and disciplinary enforcement.<sup>7</sup> He recognized the immense pressure on prosecutors, noting the inherent contradiction in "[a]cting as player and referee."<sup>8</sup> Fred counseled that the tough ethical choices must be delineated to the extent possible and that they should be crafted in advance by "informed rulemakers," not resolved by "prosecutors in the heat of battle."<sup>9</sup>

*Can Prosecutors Do Justice?* and, indeed, Fred's entire body of scholarship demonstrate intimate knowledge about the workings of criminal law and procedure, careful and nuanced analysis of legal ethics, and empathy for the challenges of the prosecutorial role. Fred also acknowledged the limits of what an ethical code—even a highly specific one—can accomplish. His goal was to encourage the promulgation of rules to curb "extreme failures that require[d] prosecutorial reaction."<sup>10</sup> He ended the article by noting that it is unfair to saddle the prosecutor, who is an advocate, with ensuring just results when the entire system of criminal defense is underfunded and badly flawed.<sup>11</sup>

### *B. Serving Justice After Convictions*

Sixteen years after *Can Prosecutors Do Justice?*, Fred explored a more specific and perplexing application of the prosecutor's general ethical obligation to do justice. In *The Role of Prosecutors in Serving Justice After Convictions*,<sup>12</sup> he explored the uncharted territory of what, if any, obligations a prosecutor might have postconviction. In this article, he discussed prosecutors' obligations after conviction regarding newly discovered exculpatory evidence, information relating to defects

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6. Fred concluded that the directive to do justice should mean two concrete things. First, throughout the entire prosecution, prosecutors must possess a good faith belief that the defendant is guilty. Second, during the trial stage, prosecutors must ensure that "the basic elements of the adversary system exist at trial." Zacharias, *supra* note 2, at 49. In crafting this second requirement, Fred set out a framework for "adversarial justice," designed to focus drafters of ethical codes on situations where the adversary system breaks down. See generally *id.*

7. *Id.* at 50.

8. *Id.* at 110.

9. *Id.*

10. *Id.* at 113.

11. *Id.*

12. See Zacharias, *supra* note 5.

in the process, new evidence based on technology, and changes in the law or the equities of the sentence.<sup>13</sup>

As with *Can Prosecutors Do Justice?*, Fred's article, *Serving Justice After Convictions*, demonstrates a deep awareness of the realities of criminal practice and the many competing demands on prosecutors' time and resources. He combined a profound respect for the challenges of the prosecutor's role with a well-founded skepticism that prosecutors can be relied on to make difficult ethical determinations without guidance or supervision.<sup>14</sup>

As Fred was keenly aware, "prosecutors' incentives at the postconviction stage militate against taking action that benefits convicted defendants."<sup>15</sup> On a simple level, prosecutors with huge case loads are inevitably pulled toward current work, not toward reevaluating or otherwise tinkering with completed cases.<sup>16</sup> In addition, reexamining a conviction "may involve confronting a prosecutor's own error or undermining the reputation of a colleague who erred."<sup>17</sup> A prosecutor may be particularly reluctant to raise questions when the "new information reflects prior prosecutorial misconduct,"<sup>18</sup> could hurt the office politically,<sup>19</sup> or engender a lawsuit.<sup>20</sup>

Beyond the self-regarding issues of added workload and injury to reputation, prosecutors can point to systemic reasons for not reexamining guilty verdicts. As Fred emphasized, prosecutors justify their reluctance to act by relying on the presumption of guilt that attaches to convicted defendants.<sup>21</sup> All legal actors recognize the importance of finality in

13. The article also discussed various scenarios in which victims and other third parties seek help from the prosecutor. *Id.* at 179–81.

14. *Id.* at 174–75 (listing three reasons—lack of law, lack of incentives, and complexity of the notion to do justice in the postconviction context—to explain that "prosecutors are ill-equipped to analyze post-trial obligations on their own"). Fred specifically chose the topic because "there is little law on the subject," either in ethical codes or state statutes. *Id.* at 174.

15. *Id.*

16. *Id.* at 213 (considering the "burden of retrying the defendant and the costs of doing so" (footnotes omitted)); *id.* at 226 ("Any significant action by a prosecutor will consume her time and, if it occasions another proceeding (e.g., a new trial), other public resources as well.").

17. *Id.* at 174.

18. *Id.* at 218.

19. *Id.* (discussing relationships with supervisors "who may have an interest in avoiding adverse public reaction if the new information is revealed; postconviction issues tend to be highly publicized and can affect a district attorney's hopes for reelection").

20. *Id.* at 219.

21. *Id.*

litigation, particularly in cases involving painful episodes for victims.<sup>22</sup> Reopening one case could call other convictions into question and lead to more requests to reexamine the guilt of those convicted.<sup>23</sup> Public trust in the justice system may be undermined if cases are frequently reopened.<sup>24</sup>

Finally, and in Fred's view the most important consideration, it is hard to figure out what justice means if the convicted defendant actually received a fair trial. Given the postconviction presumption of guilt,<sup>25</sup> the scope of any ethical obligation is subject to legitimate debate. This uncertainty as to prosecutorial obligation is coupled with immense prosecutorial discretion and power in the postconviction phase. Fred noted that in many cases, "once appeals are complete, the prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong."<sup>26</sup> As he observed, "[P]ostconviction, the prosecutor cannot rely on a subsequent fair trial to resolve any qualms that she may have about the defendant's guilt. In effect, the buck stops with the prosecutor, because she is the final decisionmaker."<sup>27</sup> Ironically, then, the obligation may be highest when the motive to act is lowest.

In *Serving Justice After Convictions*, Fred displayed his characteristic disdain for sloganeering and broad adjurations to "be good." "By calling upon prosecutors to serve 'justice,' the courts and code drafters act as if that concept is one prosecutors can readily understand and implement."<sup>28</sup> Repeating the mantra that prosecutors must "do justice" cannot substitute for careful analysis and implementation of structural controls on their behavior. Although Fred did not offer a concrete proscription, he believed the project important "if only to raise the consciousness of prosecutors and rulemakers."<sup>29</sup>

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22. *Id.* at 209.

23. *Id.* at 219. This is particularly true when "a prosecutor discovers a problem with the state's evidence-gathering technique that may have resulted in a conviction of a defendant now provably innocent through new technology." *Id.*; see also *id.* at 226 ("[A] prosecutor's willingness to perform a DNA test with reference to a previous rape conviction inevitably will cause other defendants to seek a similar indulgence, particularly if the first result is favorable to the accused and is publicized.").

24. *Id.* at 219. Fred noted, however, that "prosecutorial agencies must take into equal account the possibility of adverse public reaction if the information becomes known and no action is taken." *Id.* at 227.

25. Fred explained that "[o]nce a defendant has been tried and has exhausted his appeals, the criminal justice system is prepared to assume both that the defendant received fair process and that the process resulted in an accurate judgment." *Id.* at 210. Fred analyzed how the presumption of guilt should operate. See *id.* at 209–16.

26. *Id.* at 175.

27. *Id.* at 214.

28. *Id.* at 239.

29. *Id.* at 175.

Fred's approach to the subject included the rigor, practical applicability, balance, and compassion that mark his scholarship generally. His examples demonstrate an intimate familiarity with, and interest in, the daily lives of prosecutors.<sup>30</sup> Although acknowledging the limits of statutes and ethical codes in controlling behavior, *Serving Justice After Convictions* adeptly draws our attention to the nuances of prosecutorial discretion in this underdeveloped and undertheorized area.

### C. Postconviction Exonerations

In honoring Fred's contribution to the legal academy and to the legal profession, this Article tackles a discrete question raised in *Serving Justice After Convictions*: the issue of postconviction exculpatory DNA. Fred discussed the issue of convicts' requests for prosecutorial assistance in acquiring and testing DNA in rape cases.<sup>31</sup> Fred believed that "the DNA issue is *sui generis*."<sup>32</sup> DNA evidence is more conclusive than other types of evidence and recent exonerations suggest that "full availability and use of DNA evidence would correct a fair number of unjust convictions," particularly in serious cases.<sup>33</sup> Given the issue of access to the sample and the cost of testing, the prosecutor's "willingness to release the samples for testing and/or to authorize government testing" is crucial.<sup>34</sup> Fred also reviewed the various procedures for collateral attack, including various innocence statutes enabling access to DNA evidence, and remedies provided by case law, noting that all these possible avenues are "freighted with obstacles."<sup>35</sup>

Ironically, most of *Serving Justice After Convictions* addressed questions that appear to be more difficult for prosecutors than DNA exonerations.<sup>36</sup> For instance, Fred discussed cases in which only the

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30. See, e.g., *id.* at 227–29 (devoting a subsection to prosecutors' personal concerns).

31. *Id.* at 179–81.

32. *Id.* at 192.

33. *Id.*

34. *Id.*

35. *Id.* at 187.

36. Much of what Fred pondered—what prosecutors should do when they themselves uncover exculpatory information; whether the *Brady* obligation to disclose exonerating evidence applies postconviction; what to do when the information raises questions, but is not itself conclusive of innocence; what to do if there was a breach of process, but the accused is probably guilty anyway, *id.* at 189–91—does not concern the very limited questions I wish to address: how prosecutors react when the DNA actually exonerates the convicted defendant and is brought to their attention.



prosecutor possesses evidence of the miscarriage of justice.<sup>37</sup> With no publicity or outside check on the prosecutor's actions, the temptation to do nothing to avoid embarrassing the prosecutor or the entire office might be overwhelming. This Article, however, focuses on the startling but not infrequent cases in which the prosecutor opposes the release of a prisoner after DNA evidence seems to make the defendant's innocence plain. In such cases, the prosecutor's behavior seems truly anomalous. The "cat is already out of the bag." And so, the prosecutor looks vindictive, even ridiculous. Yet it is common for prosecutors and judges to continue arguing for the correctness of the original verdict.

### III. PROSECUTORS' DENIAL OF INNOCENCE: THE CURIOUS CASES OF DNA EXONERATIONS

#### *A. Refusal To Allow Testing*

Many cases of DNA exoneration involve years of legal battles by prisoners to secure access to DNA evidence for testing.<sup>38</sup> Since Fred wrote *Serving Justice After Convictions*, Congress passed the Innocence Protection Act of 2004, and the number of states that have adopted DNA-access statutes now totals forty-eight, with Massachusetts and Oklahoma being the two outliers.<sup>39</sup> The system, however, is still flawed.

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37. *Id.* at 178.

38. For example, Bruce Godschalk was convicted in 1987 of rape based on three types of evidence: (1) his confession, which allegedly contained information known only to the victim and police; (2) his blood type—more sophisticated DNA testing was then unavailable; and (3) eyewitness identification. Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 547–49 (2002). The Superior Court of Pennsylvania denied Godschalk's 1995 petition seeking access to the DNA evidence, finding that evidence of his guilt was overwhelming and rested on more than just the contested eyewitness identification. *Commonwealth v. Godschalk*, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996). Godschalk's subsequently sued under § 1983 and the district attorney opposed the suit, arguing that it was procedurally barred. The Federal District Court for the Eastern District of Pennsylvania allowed the testing, holding that Godschalk possessed "a due process right of access to the genetic material for the limited purpose of DNA testing." *Godschalk v. Montgomery Cnty. Dist. Attorney's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001). The court observed, "[I]f by some chance no matter how remote, DNA testing on the biological evidence excludes plaintiff as the source of the genetic material from the victims, a jury would have to weigh this result against plaintiff's uncoerced detailed confessions to the rapes." *Id.* The prosecution made false statements to the Innocence Project about whether DNA evidence existed, claiming that all the DNA evidence had been consumed in testing and that the results of that testing had been inconclusive. *Bruce Godschalk*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Bruce\\_Godschalk.php](http://www.innocenceproject.org/Content/Bruce_Godschalk.php) (last visited Mar. 14, 2011). When a carpet sample with a semen stain finally came to light, the resulting DNA testing exonerated Godschalk. *Id.*

39. *Access to Post-Conviction Testing*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Access\\_To\\_PostConviction\\_DNA\\_Testing.php](http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php) (last visited Mar. 14, 2011).

According to the Innocence Project, some states present insurmountable hurdles to the individual seeking access.<sup>40</sup> Many enabling statutes exclude cases in which the accused initially pled guilty, fail to institute sufficient protocols for preserving DNA evidence, provide no avenue for appeal, prohibit testing if the prisoner has completed his sentence, or fail to require speedy responses on requests for testing.<sup>41</sup>

Resistance to testing makes the prosecutor look as if there is something to hide.<sup>42</sup> Willingness to test, on the other hand, increases transparency and contributes both in process and substance to a sense of confidence in the justice system. The case of Roger Keith Coleman provides an interesting example. Coleman, who was convicted of rape and murder, garnered international attention, including an appearance in 1992 on the cover of *Time* magazine with the headline: "This Man Might Be Innocent This Man Is Due To Die."<sup>43</sup> Coleman's final words before his execution were: "An innocent man is going to be murdered tonight."<sup>44</sup> Post-execution, the State of Virginia rejected multiple media requests to retest the DNA evidence. The governor, however, ordered

40. *Id.*

41. *Id.*; see also Editorial, *Improving Justice*, COLUMBUS DISPATCH, Apr. 8, 2010, at 12A, available at 2010 WLNR 7270899; Kevin Johnson, *DNA Not Kept in Half of States*, USA TODAY, Aug. 6, 2008, at 1A; Mike Wagner & Geoff Dutton, *Ohio Restricts Convicts Who Try To Prove Innocence*, COLUMBUS DISPATCH, Jan. 28, 2008, at 01A, available at 2008 WLNR 1618841 ("Convicts [in Ohio] lose their chance for a DNA test when they are released from prison, whether they leave on parole or in a hearse."). In the federal arena, the Supreme Court in *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308 (2009), held 5–4 that prisoners have no constitutional right to DNA testing that might prove their innocence. *Id.* at 2323. Additionally, the President George W. Bush Administration's Justice Department developed a policy of insisting that defendants who plead guilty had to waive their rights to future DNA testing, a policy the current Justice Department is now reconsidering. Jerry Markon, *Justice Dept. To Review Bush Policy on DNA Test Waivers*, WASH. POST, Oct. 11, 2009, at A1.

42. Professor Brandon Garrett rightfully observed that the policy of requiring waivers of future DNA testing as part of plea bargains in federal court sends "a terrible message: that federal prosecutors take a dim view of truth telling." See Markon, *supra* note 41 (internal quotation marks omitted).

43. See *Roger Coleman: A Precautionary Tale*, THE SKEPTICAL JUROR (Apr. 12, 2010), <http://www.skepticaljuror.com/2010/04/roger-coleman-precautionary-tale.html> (containing a picture of the *Time* magazine cover).

44. Maria Glod & Michael D. Shear, *DNA Tests Confirm Guilt of Man Executed by Va.*, WASH. POST, Jan. 13, 2006, at A1.

testing shortly before leaving office. The DNA testing confirmed Coleman's guilt and put to rest many concerns.<sup>45</sup>

### *B. Rejecting the Implications of the Exculpatory DNA*

Most prosecutors consent to a motion to vacate the convictions after DNA exonerates the prisoner.<sup>46</sup> In fact, some prosecutors have acted with alacrity when such results are obtained. For instance, it took only two days from the time District Attorney Frank A. Sedita III received the result of Douglas Pacyon's DNA test to the time he submitted an affidavit in court to dismiss the indictment. Sedita told Pacyon, who had been wrongfully convicted in 1984, served nearly seven years, and was exonerated in June 2010, "You're owed an apology, and we apologize to you."<sup>47</sup> Sedita told reporters, "The citizens of this community need to know that the District Attorney's Office considers exonerating an innocent person as important as [convicting] a guilty one."<sup>48</sup> Notably, the district attorney addressed Pacyon directly, thereby acknowledging the exonerated man's humanity. In addition, the prosecutor expressed his systemic reasons beyond individual justice for pursuing exoneration.<sup>49</sup>

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45. Anthony Brooks, *DNA Test Backs Up Verdict in 1992 Execution*, NAT'L PUB. RADIO (Jan. 13, 2006), <http://www.npr.org/templates/story/story.php?storyId=5155870>. As one of his last acts in office, Governor Mark Warner ordered postconviction DNA testing for hundreds of prisoners. *Id.* Interestingly, one of Coleman's major supporters had to face the uncomfortable news that Coleman was actually guilty. Jim McCloskey of Centurion Ministries stated, "I always believed that Roger was completely innocent. I now know—I now know that I was wrong." *Id.* It is exactly this sort of humility and introspection that is sorely lacking in some prosecutors' offices. *Cf.* Mike Wagner & Geoff Dutton, *DNA Testing Turns Tables on Rapist*, COLUMBUS DISPATCH, May 20, 2009, at 01A, available at 2009 WLNR 9607871 (describing the story of Charles Dumas where, after insisting that he was falsely accused of raping a four-year-old girl, the prisoner refused to give a DNA sample, the Innocence Project withdrew as counsel, the prosecutor found an old sample to compare and retest confirming guilt, and the director of the Innocence Project praised the openness of the prosecutor).

46. By Professor Brandon Garrett's calculation, of the 182 cases in which prosecutors could consent to such a motion, they did so in 160 cases and opposed it in 22. Brandon L. Garrett, *Exonerees Postconviction DNA Testing*, UNIV. VA. SCH. LAW, [http://www.law.virginia.edu/pdf/faculty/garrett/judging\\_innocence/exonerees\\_postconviction\\_dna\\_testing.pdf](http://www.law.virginia.edu/pdf/faculty/garrett/judging_innocence/exonerees_postconviction_dna_testing.pdf) (last visited Jan. 11, 2011). The chart also tracks opposition to DNA testing. *Id.* Prosecutors opposed testing in almost twenty percent of the cases; in the other eighty percent, they eventually, though not necessarily immediately, agreed. *See* Shaila Dewan, *Despite Laws To Let Inmates Test DNA, Prosecutors Refuse*, N.Y. TIMES, May 18, 2009, at A1.

47. Gene Warner & Matt Gryta, *Man Jailed Nearly 7 Years for '84 Rape Is Exonerated*, BUFFALO NEWS, June 22, 2010, at A1, available at 2010 WLNR 12639043.

48. *Id.* (internal quotation marks omitted).

49. *Id.*; *see also* Thomas J. Sheeran, *Raymond Towler, Convicted Rapist, Exonerated by DNA Tests After 30 Years In Prison*, HUFFINGTON POST (May 5, 2010, 7:33 PM), [http://www.huffingtonpost.com/2010/05/05/raymond-towler-convicted-\\_n\\_564158.html](http://www.huffingtonpost.com/2010/05/05/raymond-towler-convicted-_n_564158.html) ("Prosecutors received the test results Monday and immediately asked the court

Similarly, in February 2010, DNA evidence exonerated Frederick Peacock who was convicted of rape more than three decades earlier.<sup>50</sup> District Attorney Michael Green said Peacock's continued protestation of innocence helped persuade his office to consent to testing. "You had someone who maintained their innocence and you had a sample that was available to test."<sup>51</sup> Green explained: "I look at this as doing our job, every bit as well or every bit as importantly as getting a conviction in a big murder case."<sup>52</sup>

Beyond addressing individual cases of innocence, some prosecutors' offices have established protocols to affirmatively seek out potentially innocent incarcerated prisoners. The District Attorney of San Diego directed a review of the cases of all prosecuted by the office in 1992 or earlier.<sup>53</sup> Other jurisdictions have undertaken similar reviews.<sup>54</sup>

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to free him."). In Towler's case, however, the road to exoneration was not easy or swift. He first requested DNA testing in 2004, but the sample could not be found until 2008. When the results seemed to exclude Towler, more testing was requested by the government; the testing took an additional eighteen months. *DNA Proves Ohio Man's Innocence 29 Years into a Life Sentence*, INNOCENCE PROJECT (May 5, 2010, 7:05 PM), [http://www.innocenceproject.org/Content/DNA\\_Proves\\_Ohio\\_Mans\\_Innocence\\_29\\_Years\\_into\\_a\\_Life\\_Sentence.php](http://www.innocenceproject.org/Content/DNA_Proves_Ohio_Mans_Innocence_29_Years_into_a_Life_Sentence.php). Similarly, "Thomas Vanes, now an attorney in Merrillville, Indiana, was a prosecutor for thirteen years." CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* 156 (2007). He described his experience with postconviction DNA testing and subsequent exoneration:

I learned that a man named Larry Mayes, whom I had prosecuted and convicted, had served more than 20 years for a rape he did not commit. How do we know? DNA testing. . . . Two decades later, when he requested a DNA retest on that rape kit, I assisted in tracking down the old evidence, convinced that the current tests would put to rest his long-standing claim of innocence. But he was right, and I was wrong.

Hard facts trumped opinion and belief, as they should. It as a sobering lesson, and none of the easy-to-reach rationalizations (just doing my job, it was the jurors who convicted him, the appellate courts had upheld the conviction) completely lessen the sense of responsibility—moral, if not legal—that comes with the conviction of an innocent man.

*Id.* at 157 (internal quotation marks omitted). This humility, sense of accountability, and willingness to admit error is lacking in some prosecutors' responses to exoneration of someone they convicted.

50. *Innocence Project: DNA Exonerates Man in '76 Rape Conviction*, DEMOCRAT & CHRON. (Rochester, N.Y.), Feb. 4, 2010, available at 2010 WLNR 2478703.

51. *Id.* (internal quotation marks omitted).

52. *Id.* (internal quotation marks omitted).

53. See Kreimer & Rudovsky, *supra* note 38, at 557; Zacharias, *supra* note 5, at 198–200 (discussing various prosecutor offices that have established procedures for dealing with claims that DNA testing will exonerate the prisoner).

But not every individual prosecutor or district attorney's office has reacted so promptly or responsibly. Prosecutors will sometimes minimize the importance of the DNA evidence, portraying the exoneration as a cheap, technical ploy that an embattled prosecution cannot fight, given the passage of time.<sup>55</sup> For instance, Robert Lee Stinson, who was convicted based on bite-mark evidence, demonstrated through DNA testing after conviction that the saliva from the victim's sweater was a male who was not Stinson.<sup>56</sup> In announcing that Stinson would not be retried, Assistant District Attorney Norman Gahn indicated that his office still believed Stinson was guilty of the murder and that that no factual evidence pointed to Stinson's innocence.<sup>57</sup> The evidence produced by the Wisconsin Innocence Project "raised some questions, but it didn't have much of an impact on our decision."<sup>58</sup> Instead, Gahn claimed that the staleness of the case—faded memories and destroyed evidence—rendered the case impossible to retry.<sup>59</sup>

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54. Kreimer & Rudovsky, *supra* note 38, at 558–59 (listing Ramsey County, Minnesota; Brooklyn and Suffolk County, New York; Nevada; Orange County, California; Austin, Texas; and Oklahoma County, Oklahoma).

55. See KATHRYN SCHULZ, BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR 233–35 (2010) (discussing prosecutors' reactions to exonerating DNA).

56. One of the [two bite-mark] experts testified at his trial that the bite marks "had to have been made by teeth identical" to Stinson's and that there was "no margin for error in this." The other called the bite mark evidence "overwhelming" and said "there was no question there was a match."

However, four new experts cast doubt on the original bite-mark evidence. *Charges Dropped in Wisconsin Case*, INNOCENCE PROJECT (July 28, 2009, 5:17 PM), <http://www.innocenceproject.org/Content/2090.php>.

57. Tom Kertscher, *Prosecutors Won't Retry Innocence Project Case*, MILWAUKEE J. SENTINEL, July 28, 2009, available at 2009 WLNR 14448747.

58. *Id.* (internal quotation marks omitted).

59. *Id.* A similar explanation was offered in the case of codefendants George Gould and Ronald Taylor, when the sole eyewitness, who was also a crack addict, recanted her testimony. Melissa Bailey, *Prosecutor Sticks to Guns*, NEW HAVEN INDEP. (Mar. 23, 2010, 8:04 AM), [http://newhavenindependent.org/index.php/archives/entry/prosecutor\\_sticks\\_to\\_his\\_guns/](http://newhavenindependent.org/index.php/archives/entry/prosecutor_sticks_to_his_guns/). Postconviction testing also found male DNA that that matched neither of the defendants nor the victim. The prosecutor, however, stated: "The DNA in that case is absolutely meaningless [because] [i]t doesn't tell you anything." *Id.* (internal quotation marks omitted); see also Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 525–26 (2005). Gross discusses the case of Charles Fain, who was exonerated by DNA testing after eighteen years on death row. The original prosecutor in the case said, "It doesn't really change my opinion that much that Fain's guilty." *Id.* at 526 (internal quotation marks omitted). Gross and his coauthors note, "This is hardly the only example of prosecutors and police officers refusing, against all logic, to believe that a defendant they once charged and prosecuted could possibly be innocent." *Id.* at 526 n.8; cf. *Death Row Exonerations Point to Flaws in System*, TIMES (Shreveport, La.), Jan. 24, 2010, available at 2010 WLNR 1528029 ("While acknowledging some of the exonerated cited by Death Penalty Information Center likely are innocent, death penalty supporters insist the number of death row exonerations nationwide is distorted. They maintain the term innocence has been 'redefined'").

Sometimes, prosecutors develop new scenarios to argue for guilt despite DNA results that seem to exonerate the prisoner.<sup>60</sup> In doing so, the prosecutors often must fundamentally alter their original theory of the case. Evidence that was deemed central to the conviction at trial now is dismissed as tangential or irrelevant. For instance, over the objection of the prosecution, Wilton Dedge obtained and tested hairs that were found on the rape victim's bed. At Dedge's rape trial, the prosecution alleged that the hairs were those of the rapist and that they were a genetic match with Dedge. Once postconviction DNA tests demonstrated that the hairs could not belong to Dedge, the prosecutors changed their theory of the case, arguing instead that the hairs were insignificant and that the DNA test results were insufficient to overcome the other strong evidence linking Dedge to the crime—the victim's identification of Dedge and the alleged confession Dedge gave to a jailhouse informant.<sup>61</sup>

Another prosecutorial technique for revisiting the theory of the case once new DNA evidence comes to light is to hypothesize the presence of what Peter Neufeld has famously called an "unindicted co-ejaculator."<sup>62</sup> Although the rape trial was conducted under the theory that there was only one attacker, once the DNA excludes the prisoner, the prosecutor posits a heretofore unmentioned accomplice. For instance, when postconviction tests excluded Earl Washington as the source of the semen, prosecutors argued that some unidentified accomplice joined Washington in raping and killing the victim.<sup>63</sup> Such post hoc arguments were inconsistent with the State's reliance at trial on Washington's confession, which did not mention any accomplice.<sup>64</sup> This theory also

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to include individuals freed on a technicality or those not retried due to a lack of evidence. Actually innocent is different from legally innocent, they say.").

60. See SCHULZ, *supra* note 55, at 234–35. For a discussion of how the courts should treat the new theories advocating a harmless error and judicial estoppel approach, see Hilary S. Ritter, Note, *It's the Prosecution's Story, But They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 835–36 (2005). Cf. Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423 (2001) (arguing that the prosecution should be prohibited from exploiting inconsistent positions in separate proceedings).

61. Ritter, *supra* note 60, at 835–36 (discussing Dedge's case).

62. TAVRIS & ARONSON, *supra* note 49, at 151 (internal quotation marks omitted).

63. Ritter, *supra* note 60, at 844.

64. *Id.*

contradicted the victim's statement that she had been raped by a single assailant.<sup>65</sup>

To support the conviction, the prosecutor sometimes casts aspersions on the victim. For example, Roy Criner was convicted in 1986 of sexual assaulting and murdering a sixteen-year-old girl. The evidence against Criner consisted of self-incriminating statements; serology testing of collected semen indicating that the source of the semen was a man with type O blood, which Criner had; a cigarette found near the victim's body; a clump of blonde hair found clutched in the victim's right hand; and the victim's clothing.<sup>66</sup> Although the DNA testing, which was performed eleven years after the trial, indicated that an unknown man was the source of the semen, and the DNA of the semen and on the cigarette matched that unknown man, the Texas Court of Criminal Appeals denied Criner's motion for a new trial. The court accepted the State's two new theories of the crime: (1) that Criner could have been wearing a condom during the assault or have failed to ejaculate, or (2) that the semen resulted from the victim's having engaged in consensual sex prior to her murder.<sup>67</sup> As to this new second theory, the prosecution argued that it was likely because the victim was known to have been promiscuous and probably had consensual sex with someone else before the rape. "Had she been pure and virginal, yes, the DNA test would have been more definitive," the prosecutor said.<sup>68</sup>

A Lake County, Illinois prosecutor, Michael Mermel, has on at least three occasions pursued an original conviction for rape after the DNA excluded the accused.<sup>69</sup> In two such cases, the victims were young children and the alternative explanations for the presence of semen in their bodies offered by Mermel were disturbing. In one case, Mermel suggested that the eleven-year-old was sexually active; in another, he

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65. *Id.*

66. The evidence in the case was so weak that an appellate court originally reversed the conviction. *Criner v. State*, 816 S.W.2d 137, 143-44 (Tex. App. 1991), *rev'd*, 860 S.W.2d 84, 87 (Tex. Crim. App. 1992).

67. Bob Burtman, *Hard Time*, HOUS. PRESS, Sept. 10, 1998, <http://www.houstonpress.com/1998-09-10/news/hard-time/>. One reason prosecutors offer unsupported alternate hypotheses is that courts sometimes accept these arguments. See Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 299 (1990) ("[J]udges decide in complicated ways that might be illuminated by psychological accounts of denial and rationalization, or cognitive dissonance, and that might include holding and sustaining inaccurate beliefs."). However, judicial attitudes towards exonerating DNA are beyond the scope of this Article.

68. Burtman, *supra* note 67. Eventually Criner was pardoned by then Texas Governor George W. Bush, three years after the negative DNA results had become known. See *Frontline: The Case for Innocence*, PUB. BROAD. SERV., <http://www.pbs.org/wgbh/pages/frontline/shows/case/cases/> (last visited Mar. 14, 2011).

69. Steve Mills, *Prosecutor, DNA at Odds*, CHI. TRIB., Dec. 15, 2008, at C4 (internal quotation marks omitted).

suggested that the semen, which did not match the accused, may have entered an eight-year-old's body as she played in the woods where the she was later found and where the prosecutor claimed some couples go to have sex.<sup>70</sup>

Another prosecutor has expressed what charitably might be called fanciful ideas concerning where and how young children might have picked up stray DNA. Tyler Sanchez, who is developmentally disabled, was accused of molesting an eight-year-old girl, a crime to which he confessed after a seventeen-hour interrogation, which Sanchez claims was coerced.<sup>71</sup> The male skin-cell DNA on the girl's underwear matched her father and an unknown male—not Sanchez. District Attorney Carol Chambers justified her continuing prosecution of the case: "With the low-cut jeans that girls wear, [the eight-year-old victim] could have picked up anyone's DNA off any surface her panties touched while they may have been riding up above her pants."<sup>72</sup>

A final example of prosecutors' tortured reinterpretation of evidence involves William McCaffery, who was convicted of rape. McCaffery acknowledged spending time with the victim but adamantly denied raping her. The rape kit was not a match, but McCaffery was convicted because of the victim's testimony and a supposed match with a bite mark on the victim's arm. When, after conviction, the DNA was tested and the saliva in the bite did not match McCaffery's, the prosecution argued that the DNA, which came from a woman, but not the victim, could have been left by tears shed by friends of the victim.<sup>73</sup> The victim later had a religious awakening and change of heart. She approached the district attorney and informed him that she had lied about the rape to explain her

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70. *Id.* This theory is particularly unpersuasive because the victim's body was fully clothed when she was discovered. *Id.*

71. Susan Greene, *District Attorney Turns Blind Eye to DNA Evidence*, DENVER POST, Feb. 21, 2010, at B-01.

72. *Id.* (internal quotation marks omitted). Other potential sources of the DNA, according to Chambers, were "the back of her chair at school, a restaurant, the couch at home that someone else had been sitting on, a bus seat, someone's toilet seat if she did not pull them down far enough—there are many ways to get unknown DNA on clothing. Another kid could have snapped the elastic on her underwear—kids do that sort of thing." *Id.* Currently the case is active. E-mail from Susan Greene, Reporter, Denver Post, to author (Sept. 1, 2010, 10:56 AM) (on file with author). The accused is young and has developmental disabilities—two classic predictors of a false confession. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 5 (2010).

73. 20/20: *In an Instant* (ABC television broadcast Apr. 24, 2010), transcribed at 2010 WLNR 8614680.



violent angry outbursts at some close friends and that the lie had taken on a life of its own. The prosecutor persisted with the theory that McCaffery did the biting, someone else cried into the bite, and, despite the victim's recantation, McCaffery was guilty of rape.<sup>74</sup>

### *C. Absence of Apology—Adding Insult to Injury*

In cases in which prosecutors adamantly admit no wrong, they obviously feel no impulse to apologize to defendants. When Alan G. Northrop and Larry W. Davis were released after seventeen years based on DNA exoneration, the prosecutor stated: "The reason we don't feel an apology is appropriate is that we feel the cases were prosecuted professionally."<sup>75</sup> In the case of Jabbar Collins, the conviction was vacated and barred from retrial in June 2010 because of significant evidence that the prosecutor withheld information about impairment of witnesses, threats to witnesses, and witness recantation.<sup>76</sup> The exculpatory information had come to light through the accused's own research in prison. The prosecution acknowledged the witness's recantation and the fact that the defendant was never informed of it. The prosecution, apparently in an effort to avoid an inquiry into its behavior, dropped all charges against Collins. The Brooklyn district attorney's office agreed to vacate Collins's sentence but refused to apologize. The federal judge in the case blasted the prosecution, saying, "It is indeed beyond disappointing, it is really sad that the district attorney's office persists in standing firm and saying that it did nothing wrong here."<sup>77</sup>

In fact, some prosecutors go beyond merely failing to apologize; they engage in retribution against prisoners declared factually innocent. For

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74. *Id.*

75. Laura McVicker, *Officially Free After 17 Years: Men Finally Shed Rape Charges*, COLUMBIAN (Vancouver, Wash.), July 15, 2010, at A1 (internal quotation marks omitted).

76. See Mark Fass, *Judge Orders Release of 'Jailhouse Lawyer,' Blasts D.A.'s Lack of Remorse*, LAW.COM (June 10, 2010), <http://truthinjustice.org/collins.htm>. One witness had been jailed as a material witness; another had been threatened with physical harm if he did not testify for the prosecution, and that same witness's status as a drug addict was not disclosed to the defense. *Id.*

77. A.G. Sulzberger, *Facing Misconduct Claims, Brooklyn Prosecutor Agrees To Free Man Held 15 Years*, N.Y. TIMES, June 9, 2010, at A18; see also Nick R. Martin, *"They Robbed My Kids of Their Childhood," Says East Valley Woman Imprisoned for Crime She Didn't Commit: Wrongly Convicted*, MESA TRIB. (Mesa, Ariz.), Feb. 12, 2008, available at 2008 WLNR 2715325 (internal quotation marks omitted). An Arizona woman was convicted of murder with a faulty line-up, and the real perpetrator was eventually found. The Assistant United States Attorney explained his decision to dismiss the case: "Regardless of the weight of the evidence in this matter, the government is mindful of its obligation to prove its case beyond a reasonable doubt." *Id.* (internal quotation marks omitted). The exonerated prisoner's attorney responded: "It should have been a freaking apology." *Id.* (internal quotation marks omitted).

example, one week after Reggie Deshawn Cole's exoneration for murder, the district attorney's office filed new charges against him, claiming that while incarcerated, he concealed a razor blade in his cell mattress.<sup>78</sup> Investigation by Cole's attorneys resulted in DNA evidence excluding Cole as a possible handler of the razor blade. There was also a confession from a fellow prisoner, but the district attorney would not drop the charges. The prosecutor is currently appealing the grant of Cole's petition on a finding of factual innocence.<sup>79</sup>

Some prosecutors appear vengeful and petty. For instance, William Dillon, who spent twenty-seven years in prison, is currently free based on DNA evidence but has not been formally declared exonerated.<sup>80</sup> The state attorney refused to support compensation for Dillon because Dillon was not technically exonerated and had a minor drug charge when he was a teen. An editorial in *Florida Today* referred to the state attorney's decision as "[s]tupefying and inexcusable."<sup>81</sup>

Anita Alvarez, a Chicago prosecutor, has reacted to an exoneration investigation by attacking the integrity of the Innocence Project at Northwestern University. As part of her response to the assertion of a prisoner's innocence, she has issued subpoenas and otherwise sought to investigate the students working at the Innocence Project at Northwestern. Her investigation's focus has moved beyond the facts of the prisoner's case and includes a leaked internal prosecution memorandum with false defamatory information about students from a thirteen-year-old case, subpoenaing the students' grades, and making unsubstantiated claims that student investigators bribed and flirted with witnesses.<sup>82</sup>

78. *Wrongly Convicted L.A. Man Is Released from Prison*, KTLA.COM (May 16, 2010, 2:11 PM), <http://www.ktla.com/ktla-wrongly-convicted,0,4088396.story>.

79. *Innocent Man Released from Prison Following 16 Years of Wrongful Incarceration*, CAL. W. SCH. LAW (May 17, 2010), [http://www.cwsl.edu/main/default.asp?nav=news.asp&body=news/reggie\\_cole\\_release\\_051710.asp](http://www.cwsl.edu/main/default.asp?nav=news.asp&body=news/reggie_cole_release_051710.asp). Similarly, in the case of George Gould and Ronald Taylor, when the district court threw out not only the conviction but also the arrest warrant, the prosecution moved to have the two men remain in jail while the case was appealed. Currently both exonerated men are out of prison but are required to wear GPS devices on their ankles and are prohibited from leaving the state. See Melissa Bruen, *Former Inmates Tell of Years in Prison, Overturned Conviction*, GREENWICH TIME.COM (July 28, 2010, 10:31 PM), <http://www.greenwichtime.com/default/article/Former-inmates-tell-of-years-in-prison-594475.php>.

80. *Our Views: Justice Still Denied*, FLA. TODAY, Oct. 18, 2009, at A16, available at 2009 WLNR 20650708.

81. *Id.*

82. Bryan Smith, *The Professor and the Prosecutor: Anita Alvarez's Office Turns Up the Heat on David Protess's Medill Innocence Project*, CHI. MAG., Feb. 1, 2010, at

#### D. Selective Willingness To Admit Mistakes

As noted above, many prosecutors do apologize and take remedial action. Sometimes, however, those apologies come more easily because the prosecutor is apologizing on behalf of a vanquished political rival for the office.<sup>83</sup> For instance, Harris County, Texas District Attorney Pat Lykos publically apologized to Ricardo Rachell, acknowledging that errors by police, prosecutors, and defense attorneys contributed to the “cascading, system-wide breakdown” leading to his wrongful conviction in 2003.<sup>84</sup> Among the errors was the prosecution’s failure to test DNA samples before the trial.<sup>85</sup> The prosecutor and the police chief vowed to use Rachell’s case as a catalyst for change, including instituting a tracking system for all DNA testing requests, requiring prosecutors to request DNA testing before trial in all cases where it is relevant, and seeking the creation of a regional DNA crime lab.<sup>86</sup> Lykos took her oath of office only a few months before the apology.<sup>87</sup> There is nothing to indicate that she was apologizing for her own mistake; rather she was repudiating the conduct of the prior district attorney.

Occasionally, apologies ring hollow, such as when Jim Ryan, a former prosecutor stated: “In the Cruz-Hernandez cases, the system and I failed to achieve a just outcome. And for that I am sorry.”<sup>88</sup> The apology came after years of Ryan’s insisting that the defendants were guilty and that the government had done nothing wrong.<sup>89</sup> He continued prosecuting Cruz even after the DNA exonerated him and pointed to another perpetrator, who was in fact convicted.<sup>90</sup> Ryan’s apology

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66, available at <http://www.chicagomag.com/Chicago-Magazine/February-2010/> (follow “*The Professor and the Prosecutor: Anita Alvarez’s Office Turns Up the Heat on David Protess’s Medill Innocence Project*” hyperlink).

83. See *supra* notes 46–54 and accompanying text.

84. Roma Khanna, “Systemwide Breakdown” In *Wrongful Conviction*, HOUS. CHRON., Mar. 13, 2009, at A1 (internal quotation marks omitted).

85. *Id.* Other errors included police failure to recognize that the pattern of crimes persisted after the accused was incarcerated, police failure to follow up on credible leads, and defense failure to request DNA testing. *Id.*

86. *Id.*

87. See RACHELL REPORT, OFFICE OF DIST. ATTORNEY, HARRIS CNTY., TEX., at 8–9, available at <http://app.dao.hctx.net/OurOffice/JudgeLykos.aspx> (last visited Mar. 14, 2011). In endorsing Lycos’s candidacy for district attorney, the *Houston Chronicle* decried the “culture that prized conviction at almost any cost” and noted that Lycos “pledge[d] to transform that culture.” Editorial, *Harris County DA: The Chronicle Recommends Pat Lykos for Harris County District Attorney*, HOUS. CHRON. (Oct. 19, 2008, 9:30 PM), <http://www.chron.com/dispatch/story.mpl/editorial/6067294.html>.

88. John Patterson & Christy Gutowski, *Jim Ryan: “I am Sorry,”* CHI. DAILY HERALD, Nov. 13, 2009, at 1, available at 2009 WLNR 23219034 (internal quotation marks omitted).

89. *Id.*

90. *Id.*

arrived only once he started to run for governor, and Cruz threatened to campaign against him.<sup>91</sup>

### *E. Attitudes of the Exonerated*

Although some of the prosecutorial attitudes detailed above might be chalked up to the natural byproduct of an adversarial system, this explanation fails to account for the attitude of those who are exonerated, who often exhibit remarkable forgiveness and grace. Although there is certainly a range of reactions,<sup>92</sup> the equanimity and graciousness demonstrated by some of the exonerated is inspiring. For example, Dennis Maher spent nineteen years in a Massachusetts prison for a series of rapes he did not commit. For many of those years he petitioned to test DNA evidence. The courts refused based on the strength of the eyewitness testimony against Maher. Maher told CBS News that he is not angry. "If I am angry then I am going to be bitter and dwell on what I lost," he said.<sup>93</sup> In a similar vein, upon being proved innocent of the rape of two young girls, a crime for which he served twenty-nine years in prison, Raymond Towler proclaimed: "This is the greatest day of my life, and it's pure joy; I have no hate for anyone."<sup>94</sup>

## IV. WHY DO PROSECUTORS RESIST OBVIOUS POSTCONVICTION CLAIMS OF FACTUAL INNOCENCE?

Many scholars, defense attorneys, and editorialists have struggled with the question: why do prosecutors resist *obviously* true claims of innocence? It is understandable, if reprehensible, that a prosecutor might try to hide an error, but why do some prosecutors persist in ridiculous claims that make them appear petty and delusional? In this

91. *Id.*

92. Of course, some of the exonerated are understandably bitter about their unfair imprisonment. For instance, Billy Smith said, "To me, an apology, it won't do, because an apology can't bring back the time that I spent. It can't bring back my loved ones. . . . I lost ten family members while I was incarcerated. I never got to go to the funeral of any one of them." *DNA Helps Free Inmate After 27 Years*, CBS NEWS (May 4, 2008), <http://www.cbsnews.com/stories/2008/05/02/60minutes/main4065454.shtml> (internal quotation marks omitted).

93. Manuel Gallegus, *Case Renews Wrongful Conviction Debate*, CBS NEWS (Mar. 28, 2010), <http://www.cbsnews.com/stories/2010/03/28/eveningnews/main6342150.shtml> (internal quotation marks omitted).

94. *DNA Proves Ohio Man's Innocence 29 Years into a Life Sentence*, *supra* note 49 (internal quotation marks omitted).

section, I will review some traditional explanations, some recent psychological and cognitive insights, and a related theory about denial to help understand prosecutors' resistance to DNA testing and the consequent exculpating results.

### A. Traditional Explanations

Traditional explanations about a prosecutor's refusal to cooperate in testing or then refuting the relevance of the test results fall within five categories. The first category consists of the explanations that prosecutors offer. The rest are less benevolent interpretations that relate to the prosecutor's mindset and the incentive structure for prosecutors.

First, as prosecutors explain, there are systemic issues of finality and cost.<sup>95</sup> As Plymouth County District Attorney Timothy Cruz said, "At what point do we say no?"<sup>96</sup> Cruz expressed concern that requests for testing DNA would overload the system. He stated, "We'd have individuals who will just say, 'I want this, I want to test,' this and it really would open up the flood gates."<sup>97</sup> In response to the creation of Ohio's new innocence project, a Warren County Prosecutor warned: "I don't want to see the taxpayer foot the bill for a lot of inmates who claim that they're innocent and aren't."<sup>98</sup> This concern for cost and waste of prosecution time was echoed by Justice Alito in *District Attorney's Office for the Third Judicial District v. Osborne*.<sup>99</sup> Justice Alito noted the cost of maintaining samples; even if the accused paid for the testing, the government would incur significant expense by granting them "a never-before-recognized constitutional right to rummage through the State's genetic-evidence locker."<sup>100</sup> To be fair, many postconviction motions filed by prisoners do lack merit, and prosecutors understandably see entertaining such motions as a waste of time and resources.<sup>101</sup> In *Serving Justice After Convictions*, Fred acknowledged the legitimacy of such concerns in weighing when requests for DNA testing should be honored.<sup>102</sup>

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95. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 146 (2004) (discussing finality).

96. Gallegus, *supra* note 93 (internal quotation marks omitted).

97. *Id.* (internal quotation marks omitted).

98. Andrew Welsh-Huggins, *Ohio Defender Takes on Innocence Project*, J. GAZETTE (Fort Wayne, Ind.), Nov. 20, 2009, at 6C, available at 2009 WLNR 23488501 (internal quotation marks omitted).

99. 129 S. Ct. 2308, 2324–30 (2009) (Alito, J., concurring).

100. *Id.* at 2328.

101. See Medwed, *supra* note 95, at 148.

102. Zacharias, *supra* note 5, at 226.

The issue of finality is sometimes framed in terms of victim repose—any disruption to the verdict would unsettle the victim. For instance, Anthony Wright was accused of raping and killing a seventy-seven-year-old woman. In arguing against allowing DNA testing, Peter Carr, the assistant district attorney (ADA) who handled the case, stated, “There’s also the idea that you want finality for the victim’s sake. . . . If someone else’s semen was found at the crime scene, we’d have to talk to the victim’s family about whether the victim was sexually active,” Carr explained.<sup>103</sup>

Indeed, some judges and prosecutors acknowledge that they are willing to tolerate mistaken convictions of the innocent in the interests of finality and fiscal prudence.<sup>104</sup> As Justice Souter observed in dissent in *Osborne*, however, “[F]inality is not a stand-alone value that trumps a State’s overriding interest in ensuring that justice is done in its courts and secured to its citizens.”<sup>105</sup> In responding to Justice Alito’s concerns, Justice Souter also argued, “While state resource constraints might

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103. Dewan, *supra* note 46 (internal quotation marks omitted). Carr’s assumption that victims would be horrified about the reexamination of the evidence makes sense, but certainly victims’ feelings cannot trump issues of guilt or innocence. Additionally, one might impute to victims a desire to punish the right perpetrator, not just anyone. In terms of feeling safe, the victim needs to know that the actual assailant is behind bars. Beyond that, as a moral matter, the victim may feel a deep desire to do justice. See SCHULZ, *supra* note 55, at 239–46 (describing the reaction of Penny Beernsten, who sought to correct the damage done in her honest but wrong identification).

104. Justice Scalia famously dissented in *In re Davis*, writing that:

This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged “actual innocence” is constitutionally cognizable.

130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting). The import of Justice Scalia’s argument is that unless the trial was unfair, we must tolerate mistakes, even to the point of executing the innocent. Certainly then, under his reasoning, in cases not involving death sentences, the benefits of finality and lowering cost will outweigh the benefits of exoneration. Obviously, not everyone agrees with Justice Scalia’s calculus. As Justice Blackmun stated in *Herrera v. Collins*, “Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent.” *Herrera v. Collins*, 506 U.S. 390, 430 (1993) (Blackmun, J., dissenting) (citations omitted); see also Kreimer & Rudovsky, *supra* note 38, at 617 (“With over 100 persons exonerated of serious criminal convictions, including capital offenses, finality does not demand—and the Constitution does not tolerate—willful refusal to allow access to potentially exculpatory DNA evidence.”).

105. Dist. Attorney’s Office for the Third Judicial Dist. v. *Osborne*, 129 S. Ct. 2308, 2337 (2009) (Stevens, J., dissenting).

justify delays in the testing of postconviction DNA evidence, they would not justify an outright ban on access to such evidence.”<sup>106</sup>

Issues of finality and cost obviously play a role in prosecutors’ resistance to testing or storing DNA samples. They cannot, however, serve as an explanation of prosecutors’ refusal to release someone whom DNA evidence has already exonerated.

A second traditional explanation for this resistance involves the structural incentives that may combine with prosecutors’ personal career interests; such acknowledgement could damage a career, reduce a high win rate, and tarnish the appearance of invincibility.<sup>107</sup>

Third, prosecutors may resist exonerations because they fear disrupting the operation of the office and undermining the public’s trust in the justice system.<sup>108</sup> Probably the most painful and direct possible consequence of admitting error is the possibility of impugning the prosecutor’s own behavior or that of a colleague.<sup>109</sup> According to the Innocence Project, thirty-three out of the first seventy-four DNA

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106. *Id.* at 2336–37 n.8.

107. See MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 47 (1999) (“It was just a matter of winning. I just had to win. A lot of prosecutors are into that.” (internal quotation marks omitted)); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) (“Favorable win-loss statistics boost prosecutors’ egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.”); Medwed, *supra* note 95, at 134–35; Barbara O’Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1010 (2009) (“High conviction rates bolster re-election campaigns and funding requests. They also help an individual prosecutor advance within the office; indeed, winning is considered such a reliable indicator of work quality that some offices require a prosecutor to file a report explaining why a trial ended in acquittal, imposing no such requirement for convictions.”).

108. Medwed, *supra* note 95, at 136.

109. For instance, the case of Jabbar Collins, who was released by a federal judge in an agreement with the prosecution because *Brady* material was withheld, see *supra* notes 76–77 and accompanying text, called into question the behavior of Assistant District Attorney Michael Vecchione, who had tried Collins’s case and was by then the chief of the office’s Rackets Division that investigated corruption on the Brooklyn bench. According to the *Village Voice*, the prosecutor’s investigation of the Brooklyn judiciary might be part of the reason that in 2004, Brooklyn Supreme Court Justice Robert Holdman found Collins’s assertions of misconduct “wholly without merit, conclusory, incredible, unsubstantiated, and, in significant part, to be predicated on a foundation of fraud.” Tom Robbins, *A Jailhouse Lawyer Says a Top Brooklyn Prosecutor Rigged His Murder Conviction*, VILLAGE VOICE (June 1, 2010), <http://www.villagevoice.com/content/printVersion/1838926/>. Brooklyn District Attorney Charles J. Hynes, who was in the prosecutor’s office during Collins’s conviction, defended Vecchione, and in fact lauded him, saying that no investigation or disciplinary action was planned. Hynes stated: “Anyone who knows Mike Vecchione, who has ever seen him in action, knows that he is a very, very principled lawyer.” Sulzberger, *supra* note 77 (internal quotation marks omitted).

exonerations involved prosecutorial misconduct.<sup>110</sup> If, indeed, there was subornation of perjury, failure to turn over *Brady* material, or secret deals with witnesses, the prosecutor may feel that exoneration will open questions about the legality and ethics of the attorneys involved or the entire office.<sup>111</sup> Similarly, prosecutors may be reluctant to undermine or criticize the work of the police who are their partners in law enforcement and on whom they depend to generate evidence.

Fourth, the hyper-adversarial culture of some prosecutors' offices may make admitting mistakes seem like weakness.<sup>112</sup> Anecdotal evidence suggests a culture in some offices in which deputy prosecutors demonize defendants, thinking of them as subhuman, and glorify their own roles in the process, thinking of themselves as the "good guys."<sup>113</sup> A deep cynicism can develop about defendants, who are perceived as liars and whiners.<sup>114</sup> As former Assistant District Attorney David Heilbroner described it, among his cohort of ADA's, there was "a growing sense of self-righteousness, as if being an ADA were the most noble of all legal existences, and being a team player meant not questioning that we were

110. *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Mar. 14, 2011).

111. See Medwed, *supra* note 95, at 136–37; see, e.g., Editorial, *Justice on Trial in Masters Case*, DENVER POST, Jan. 22, 2008, at B06, available at 2008 WLNR 1239973 (acknowledging that the original prosecutors withheld potentially exonerating evidence). Prosecutors have absolute immunity for their prosecutorial roles but not for investigative acts. Fear of lawsuits may play a role in their decision to resist testing or reject the results of exonerating DNA. *But see* Warney v. Monroe Cnty., 587 F.3d 113, 125 (2d Cir. 2009) (holding that prosecutors who did not immediately reveal the exonerating DNA results, but instead sat on them for two months, could not be sued personally because they enjoy absolute immunity).

112. See Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289–90 (2001).

113. Compare DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A.* 239 (1990) ("[T]he man should just be shot. He's an animal." (quoting a fellow prosecutor referring to an accused)), with BAKER, *supra* note 107, at 17.

114. TAVRIS & ARONSON, *supra* note 49, at 132 (discussing prosecutors' cynicism because people lie to prosecutors all the time); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 519 (2007) ("[P]rosecutors live in a world that constantly reinforces their perceptions that the defendants charged in their cases are all guilty."); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 384 (2001) ("For many prosecutors, cynicism takes over in both style and substance. In order not to be played for a fool, taken for a ride, considered a sucker—a nightmarish reputation for a prosecutor—prosecutors often become suspicious, untrusting, disbelieving.").



the good guys.”<sup>115</sup> The culture of the office, as described by Heilbroner, rewarded bravado and frowned upon admitting ignorance or mistake.<sup>116</sup> Allowing a defendant—even an innocent one—to win could appear to be a loss for the side of the angels.<sup>117</sup>

Fifth, and closely related to the previous point about prosecutorial culture, one can speculate about the personality profile of those attracted to the job of prosecutor and the personality changes a prosecutor might undergo given the power of that position. As to who might self-select for the job of prosecutor, one can speculate that those attracted to the prosecution feel a mission to serve the public, are comfortable judging others, and have confidence in their own judgment.<sup>118</sup> Some of those who choose to prosecute may be infused with a partisan’s zeal and less likely to admit mistakes.<sup>119</sup> As to personality changes that might occur,<sup>120</sup> the tremendous power and discretion of prosecutors in making charging decisions and offering pleas could go to anyone’s head.<sup>121</sup>

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115. HEILBRONER, *supra* note 113, at 75; *see also* BAKER, *supra* note 107, at 47 (“You get a mind-set that everybody’s bad, everybody’s guilty, and everything is wrong. Everybody is a liar. Everybody is corrupt.” (internal quotation marks omitted)).

116. *See generally* HEILBRONER, *supra* note 113.

117. *See* Smith, *supra* note 114, at 378–79 (“Too often prosecutors believe that because it is their *job* to do justice, they have extraordinary in-born wisdom and insight. Too often prosecutors believe that they *and only they* know what justice is. There is an inherent vanity and grandiosity to this aspect of the prosecution role. Many prosecutors genuinely believe they are motivated only by conscience and principle. But many prosecutors come to believe they are the only forces of good in the system.” (footnotes omitted)). *But see* Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas*, WASH. POST, Mar. 5, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/04/AR2007030401566.html> (“We’re not being soft on crime. We’re being sure we get the right person going to jail.” (quoting Craig Watkins, newly elected Dallas County district attorney)).

118. *See* Medwed, *supra* note 95, at 139–40 (discussing self-righteous and “gung-ho” attitude of prosecutors).

119. *See* BAKER, *supra* note 107, at 133 (“Some prosecutors begin to believe that they are not just the people’s unbiased representative in criminal prosecution but that they are God’s designated hitter in the World Series of Life.”). *But cf.* Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2121 (2010) (examining the “rhetoric [of] the wrongful conviction literature” and arguing that it “alienates the very parties who hold the power to initiate many of the most promising reforms of the movement: prosecutors”).

120. BAKER, *supra* note 107, at 253 (working as a district attorney, “[y]ou don’t leave office the same person you were”).

121. *Id.* at 134 (“In a system where they hold most of the power, these prosecutors remain stubbornly intractable out of personal vanity and contempt for the men and women they prosecute.”); HEILBRONER, *supra* note 113, at 15 (“[P]rosecutors operated under an entirely different set of rules. They had the power to dismiss weak cases, lower the charges for deserving defendants, and lean on the truly heinous.”).

*B. New Theories on Psychological and Cognitive Challenges Facing Prosecutors*

A new emphasis on psychology and cognition supplements the traditional theories explaining prosecutors' resistance to DNA testing and to its revelations. First of all, psychologists confirm what we all know intuitively: no one enjoys being wrong, even about trivial matters, let alone about consequential decisions that vastly influence other people's lives. "[T]he experience of being right is imperative for our survival, gratifying for our ego, and, overall, one of life's cheapest and keenest satisfactions."<sup>122</sup> The feeling of being right is visceral and stems as much from experience and emotion as from logic.<sup>123</sup> As for being wrong, "we tend to view it as rare and bizarre—an inexplicable aberration in the normal order of things. . . . [I]t leaves us feeling idiotic and ashamed."<sup>124</sup>

And, of course, prosecutors, like all of us, are subject to cognitive biases—various tendencies to make errors under certain circumstances because of factors that interfere with our ability to draw rational conclusions from the evidence.<sup>125</sup> Professor Alafair S. Burke has addressed how, specifically, cognitive biases affect prosecutors' judgment and the exercise of prosecutorial discretion.<sup>126</sup> Burke noted that a focus on crass incentives, such as win-loss ratios, does not tell the full story of what motivates prosecutors.<sup>127</sup>

One such cognitive bias, discussed by Burke and others, is the confirmation bias—the tendency to search for and interpret information in line with one's preconceptions.<sup>128</sup> Our minds tend to follow the

122. SCHULZ, *supra* note 55, at 4.

123. ROBERT A. BURTON, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN WHEN YOU'RE NOT xi (2008) ("Certainty and similar states of 'knowing what we know' arise out of involuntary brain mechanisms that, like love or anger, function independently of reason.").

124. SCHULZ, *supra* note 55, at 5.

125. See Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 195–200 (2007).

126. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593 (2006) (exploring confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance, all types of cognitive bias that affect prosecutorial decisionmaking and exercise of discretion).

127. *Id.* at 1590–91.

128. See O'Brien, *supra* note 107, at 1011 (defining the confirmation bias as a "tendency to seek and interpret evidence in ways that support existing or favored beliefs," and

course that we initially set and seek information that confirms our biases, theories, and preconceptions. In a similar vein, the phenomenon of “tunnel vision” explains how once a suspect is identified, contradictory evidence will be dismissed or minimized.<sup>129</sup> Another such cognitive bias is “cognitive dissonance,” which is “the tension created when someone’s thoughts or beliefs are incompatible with his or her behavior.”<sup>130</sup> Cognitive dissonance erects a psychological barrier to admitting to doubts about a case.

These cognitive biases are not products of a conscious process whereby a person acknowledges a bias or a need for a preferred result and justifies those conclusions with bogus reasons. Instead, our minds unconsciously begin to justify our conclusions, and we believe our own reasons.<sup>131</sup>

Once the State decides to charge a defendant and a prosecutor has invested a lot of time in a case, the prosecutor has made an intellectual, moral, and personal commitment to the accused’s guilt. Information supporting guilt will be shored up by the confirmation bias.<sup>132</sup> Information negating guilt will be treated more skeptically.<sup>133</sup> Cognitive dissonance

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noting that “[c]onfirmation bias connotes something more subtle and less conscious than the deliberate case building that any attorney must do to prepare for trial.”).

129. See Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 492–94 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 354; O’Brien, *supra* note 107, at 1044 (“‘Tunnel vision’ refers to a collection of cognitive heuristics and tendencies that investigators sometimes employ once they focus on a particular suspect. An investigator exhibiting tunnel vision selects and filters evidence with an eye toward building a case against that suspect and consequently overlooks evidence that undermines it.” (footnote omitted)); Myrna Raeder, *What Does Innocence Have To Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327–28 (discussing tunnel vision).

130. O’Brien, *supra* note 107, at 1014; see also Burke, *supra* note 126, at 1601 (“The social science evidence suggests that inconsistency between one’s external behavior and internal beliefs creates an uncomfortable cognitive dissonance.”).

131. William M. Klein & Ziva Kunda, *Motivated Person Perception: Constructing Justifications for Desired Beliefs*, 28 J. EXPERIMENTAL SOC. PSYCHOL. 145, 158 (1992) (“[R]ather than blindly proclaiming their desired beliefs, people attempt to construct seemingly rational justifications for them.”).

132. Postconviction, the guilty verdict or plea will confirm the prosecutor’s belief in the prisoner’s guilt. TAVRIS & ARONSON, *supra* note 49, at 133 (explaining the mentality as “[o]nce that person goes to jail, that fact alone justifies what we did to put him there”); Burke, *supra* note 126, at 1612.

133. Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 568 (1992) (“[P]eople are less skeptical consumers of desirable than undesirable information.”). Ditto and Lopez also noted that “the robust tendency of individuals to perceive information that is consistent with a preferred judgment conclusion (preference-consistent information) as more valid than information that is inconsistent with that conclusion (preference-inconsistent information).” *Id.* at 569.

further disrupts the prosecutor's ability to evaluate exculpatory evidence.<sup>134</sup> As Professor Burke explains, "To avoid cognitive dissonance, an ethical prosecutor might cling to the theory of guilt to reconcile her conduct with her beliefs, especially after the defendant has been convicted."<sup>135</sup> Further, Professor Burke has observed that "even 'virtuous,' 'conscientious,' and 'prudent' prosecutors fall prey to cognitive failures."<sup>136</sup>

Professor Barbara O'Brien argues that prosecutors may be particularly susceptible to cognitive biases because their dual roles as zealous advocates and ensurers of justice "place demands on prosecutors that are untenable from a psychological perspective."<sup>137</sup> O'Brien applies the lessons of cognitive science to argue that "prosecutors' distinctive institutional environment may undermine not just their willingness to play fair but also their ability to do so."<sup>138</sup> O'Brien explains that "when people must justify a decision to which they have already committed, they tend to engage in 'defensive bolstering'—holding fast to that position even in the face of contrary evidence."<sup>139</sup> Because prosecutors must stake out a position and because they receive rewards for persuading others of that position, their psychological ability to acknowledge weaknesses in their arguments is diminished.<sup>140</sup>

Groups of people or entire organizations can also experience distortions in decisionmaking. The term *groupthink* describes a dynamic within an organization whereby members of a deeply cohesive group "minimize conflict and reach consensus without critically testing, analyzing, and evaluating ideas."<sup>141</sup> Several common symptoms of groupthink include the illusion of invulnerability; rejection or rationalization of data that might cause the group to reconsider its assumptions; the stifling of dissenting views that undermine shared illusions; self-censorship by group members of dissenting views; and stereotyped, demeaning views

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134. Burke, *supra* note 126, at 1612–13.

135. *Id.* at 1613.

136. *Id.* at 1593 (footnotes omitted).

137. O'Brien, *supra* note 107, at 1001; *see also id.* at 1003 (acknowledging the valuable work on cognitive bias and agreeing that prosecutors fall prey to such biases, and arguing that the system in which prosecutors operate "entails a unique constellation of incentives, goals, and norms").

138. *Id.* at 1001.

139. *Id.* at 1004.

140. *Id.*

141. *Groupthink*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Groupthink> (last modified Mar. 8, 2011).

of competitors.<sup>142</sup> It is easy to imagine how prosecutors' offices, with their shared mission, camaraderie, adversarial posture, and zealous desire to punish wrongdoers can easily fall into groupthink.

### C. Denial

Denial, though it has much in common with self-justification and avoidance of cognitive dissonance, involves more than just thinking patterns that predictably go awry. Denial is a deeper, more emotional mechanism that our unconscious uses to screen out unpleasant realities and the resultant distressing feelings.<sup>143</sup> The literature on denial, which offers many insights similar to those resulting from the study of cognitive bias, draws upon the experience of trauma. "Denial is the unconscious calculus that if an unpleasant reality were true, it would be too terrible, so therefore it cannot be true."<sup>144</sup> The process of denial is not conscious or volitional. It is "an unconscious defen[s]e mechanism for coping with guilt, anxiety and other disturbing emotions aroused by reality."<sup>145</sup>

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142. RICHARD S. TEDLOW, DENIAL: WHY BUSINESS LEADERS FAIL TO LOOK FACTS IN THE FACE—AND WHAT TO DO ABOUT IT 33–34 (2010).

143. We deny what we cannot face because it is simply too painful. In psychoanalytic terms, denial is a way for the ego to repress painful facts and thoughts by crowding them out of consciousness. David S. Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 IND. L.J. 651, 658–59 (1991); see Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 910–11 (2005) ("Intrapsychic denial involves a form of cognitive distortion in which a person's conscious mind is unwilling to face an aspect of reality, as when a patient diagnosed with a terminal illness acts like there was no such diagnosis. It is a psychological defense mechanism, specifically, 'an unconscious process whereby painful thoughts and feelings are repressed.'" (footnotes omitted)); Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing To Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 533 (2008) (defining denial as a "fundamental human coping mechanism that is used to avoid confronting unpleasant realities and that also potentially impedes personal growth").

144. TEDLOW, *supra* note 142, at 2; *id.* at 175–76 ("How do people react when they find themselves facing a fact that is too terrible to be true? We have already encountered the answer to this question. They deny it. If something is too terrible to be true, then it cannot be true, because if it were, things would be too terrible.").

145. STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 5 (2001) ("Denial is also studied in terms of cognitive psychology and decision making. This approach emphasizes the normality of the process, and plays down its emotional component. Denial is a high-speed cognitive mechanism for processing information, like the computer command to 'delete' rather than 'save.'"); *id.* at 9 ("Denial, then, includes *cognition* (not acknowledging the facts); *emotion* (not feeling, not being disturbed); *morality* (not recognizing wrongness or responsibility) and *action* (not taking active steps in response to knowledge)."). As Richard S. Tedlow explains in his book, *Denial*, describing the faulty decisionmaking of CEOs, "This of course means that we are also always making unconscious choices about what *not* to notice. . . . [W]e divert information from awareness . . . because the offending information contradicts assumptions

Denial can happen on an individual level, such as an alcoholic who denies having a drinking problem, or can affect an entire society, such as German villagers who claimed to be unaware of Nazi genocide in nearby concentration camps.<sup>146</sup> Denial is not necessarily all bad; it sometimes has personal and social utility.<sup>147</sup> The terminal cancer patient may deny the severity of her illness to avoid dwelling on death and thereby enjoy whatever time remains.<sup>148</sup> A certain amount of wishful thinking and illusion is part of normal cognition and staves off the kind of depression that grim realism may engender.<sup>149</sup> However, denial “is inevitably distorting. It can prevent the individual from understanding reality and from dealing with it effectively.”<sup>150</sup>

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with which we are comfortable, and it is easier to reject the information than to change our assumptions.” TEDLOW *supra* note 142, at 33.

146. Caudill, *supra* note 143, at 661; *see generally* DANIEL GOLEMAN, *VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF-DECEPTION* (1985) (describing society-wide denial). Denial can involve whole swaths of society and reflect a basic unwillingness to engage harsh truths. *See* COHEN, *supra* note 145, at 9 (“Denial can be individual, personal, psychological and private—or shared, social, collective and organized.”); MICHAEL SPECTER, *DENIALISM: HOW IRRATIONAL THINKING HINDERS SCIENTIFIC PROGRESS, HARMS THE PLANET, AND THREATENS OUR LIVES* 3 (2009) (“Denialism is denial writ large—when an entire segment of society, often struggling with the trauma of change, turns away from reality in favor of a more comfortable lie.”).

147. Sociobiologists conjecture that denial is a useful evolutionary trait. It is easier to deceive others when one truly believes the lie oneself. *See* TEDLOW, *supra* note 142, at 34 (“Some sociobiologists assert that denial evolved as the handmaiden of deceit. Believing our own lies made us more believable liars, the theory goes, and better liars were more likely to survive. Natural selection therefore favored self-deception. This is an intriguing theory but not an easy one to prove.”).

148. *See id.* at 2 (“Denial . . . is soothing. It is convenient. It allows us to live in a world of our own creation—while it lasts. It permits us an ‘as if’ existence. We live ‘as if’ things were the way we want them to be, rather than the way they are.”); Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 *YALE J.L. & HUMAN.* 171, 177 (2000).

149. *See* Shelley E. Taylor, *Adjustment to Threatening Events: A Theory of Cognitive Adaptation*, 38 *AM. PSYCHOLOGIST* 1161, 1171 (1983) (“As the literature on depression and on the self makes clear, normal cognitive processing and behavior may depend on a substantial degree of illusion, whereas the ability to see things clearly can be associated with depression and inactivity.”); *cf.* BURTON, *supra* note 123, at 221 (“[A] placebo effect is a false belief that has real value.”).

150. Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 *PSYCHOL. PUB. POL’Y & L.* 901, 905 (1998); *see* EVIATAR ZERUBAVEL, *THE ELEPHANT IN THE ROOM: SILENCE AND DENIAL IN EVERYDAY LIFE* 80 (2006) (“Inherently delusional, denial inevitably distorts one’s sense of reality, a problem further exacerbated when others collude in it through their silence.”).

Social psychologists, therapists, and philosophers talk about the paradox of denial: In order to deny something, one has to know it at some level. Freud described it as the combination of “knowing with not knowing.”<sup>151</sup> If one does not know it at all, that constitutes ignorance or bad judgment, not denial.<sup>152</sup> However, as Stanley Cohen has observed, “Denial is always partial; some information is always registered. The paradox of doubleness—knowing and not-knowing—is the heart of the concept.”<sup>153</sup>

Denial need not be absolute, as when a regime denies torture or an individual denies committing a crime. Denial can also take the form of acknowledging facts but minimizing them, offering different interpretations, or justifying the end result. As Cohen explains in his magisterial work, *States of Denial*, “[T]he information is registered—there is no attempt to deny the facts—but its implications are ignored.”<sup>154</sup> The prosecutor engages in what Cohen calls “interpretive denial.”<sup>155</sup> Facts are not denied outright—“[r]ather, they are given a different meaning from what seems apparent to others.”<sup>156</sup> For instance, the prosecutor reinterprets the value of the biological evidence that was once central to the theory of guilt and now claims that the DNA does not matter.<sup>157</sup> Other evidence—the confession, the jailhouse snitch, and the eyewitness testimony—confirms guilt. The DNA is suddenly a sideshow that can be explained away by positing new and preposterous facts—an extra perpetrator or a lying victim. Additionally, prosecutors tend to focus on process and legalisms, rather than the fairness of the results.<sup>158</sup>

That the prosecutor has invested time and energy into proving the prisoner’s guilt<sup>159</sup> and has learned to think of the accused as a bad guy

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151. TEDLOW, *supra* note 142, at 2.

152. See COHEN, *supra* note 145, at 5–6 (“In order to use the term ‘denial’ to describe a person’s statement ‘I didn’t know’, one has to assume that she knew or knows about what it is that she claims not to know—otherwise the term ‘denial’ is inappropriate. Strictly speaking, this is the *only* legitimate use of the term ‘denial’.”).

153. *Id.* at 22 (internal quotation marks omitted).

154. *Id.* at x; see Roy F. Baumeister et al., *Freudian Defense Mechanisms and Empirical Findings in Modern Social Psychology: Reaction Formation, Projection, Displacement, Undoing, Isolation, Sublimation, and Denial*, 66 J. PERSONALITY 1081, 1107–08 (1998) (“[There is little] evidence that people systematically refuse to accept the physical reality of actual events, especially when confronted with palpable proof. . . . [But] there is abundant evidence that people will reject implications and interpretations that they find threatening.”).

155. See COHEN, *supra* note 145, at 7.

156. *Id.*

157. See *supra* notes 46–74 and accompanying text.

158. TAVRIS & ARONSON, *supra* note 49, at 131–32.

159. Prosecutors have “accrued significant sunk costs” and like all people are “woefully bad at cutting [their] losses.” SCHULZ, *supra* note 55, at 194–95; see Burke, *supra* note 125, at 202 (“[A]mple evidence demonstrates that people are affected by sunk costs and

affects the prosecutor's ability to see mistakes and fosters denial. In their enthralling book, *Mistakes Were Made (But Not by Me)*, Carol Tavris and Elliot Aronson devote a full chapter, entitled "Law and Disorder," to wrongful convictions, chronicling such convictions, as well as police and prosecutorial intransigence.<sup>160</sup> They credit the self-interested, structural reasons that prosecutors might bury the truth about a perpetrators' innocence but argue persuasively that such explanations are incomplete. Looking at the question from the prosecutors' perspective,

You have plenty of such external incentives for denying that you made a mistake [for example, reputation and concerns about future criminality of the person exonerated], but you have a greater internal one: You want to think of yourself as an honorable, competent person who would never convict the wrong guy. But how can you possibly think you got the right guy in the face of the new evidence to the contrary? Because, you convince yourself, the evidence is lousy, and look, he's a bad guy; even if he didn't commit this particular crime, he undoubtedly committed another one. The alternative, that you sent an innocent man to prison for fifteen years, is so antithetical to your view of your competence that you will go through mental hoops to convince yourself that you couldn't possibly have made such a blunder.<sup>161</sup>

As Kathryn Schulz observed,

Error . . . is less an intellectual problem than an existential one—a crisis not in what we know, but in who we are. We hear something of that identity crisis in the questions we ask ourselves in the aftermath of error: *What was I thinking? How could I have done that?*<sup>162</sup>

When those questions are too painful, it is easier to deny the error entirely.<sup>163</sup>

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permit prior investments of time, money, and resources to influence their current choices."'). These costs are not just of time and money but also of investment of ego, *id.* at 195, and passion, *id.* at 186–92.

160. TAVRIS & ARONSON, *supra* note 49, at 127–57.

161. *Id.* at 131.

162. SCHULZ, *supra* note 55, at 21.

163. The prospect of wrongful conviction is even more difficult to face if one were to acknowledge another painful fact—that our penal system often tolerates prison torture and rape. See generally ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>; Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize To End Prison Rape*, 32 J. LEGIS. 129 (2006) (discussing the prevalence and harm of prison rape). Although we would never say that the penalty for committing a crime is humiliation, physical degradation, and sexual violence, that is the lived experience for many prisoners. The fact that we consign convicts to such horrible torment makes the prospect of wrongful conviction that much harder to face.



In an interesting twist on O'Brien's thesis of the impossibility of the prosecutors' dual role,<sup>164</sup> Tavis and Aronson's argument leads to the conclusion that the duty to do justice *itself* inspires denial. As Professor Burke has noted, "[P]rosecutors are drawn to their jobs because of the identity that comes with it."<sup>165</sup> That identity is the pursuer of justice. Because prosecutors owe a responsibility to justice, they will have a particularly strong cognitive need to self-justify. Ironically, their keen awareness of their special duty to do justice is going to distort their ability to assess the truth.<sup>166</sup> According to Burke, prosecutorial resistance to exculpatory evidence

may indicate a deep but biasing adherence to the edict that prosecutors should only do justice. A prosecutor may give short shrift to claims of innocence, in other words, not because she is callous about wrongful convictions, but because she cannot bring herself to believe that she has played a part in one.<sup>167</sup>

Thus, although there are rational finality and resource arguments justifying prosecutors' rejection of some requests to test DNA, their response to such requests also contains an aspect of denial. Beyond issues of process, cost, and finality, at some level the prosecutor simply does not want to know the truth. If the prosecutor were fully confident in the prisoner's guilt, the prosecutor might welcome such tests.

Sometimes prosecutors cannot deny the wrongful conviction on the crime charged, but they nevertheless deny the harm on the grounds that the prisoner is a bad person who has committed some crimes that deserve punishment. This is one of the traditional explanations of prosecutor's behavior—arrogance because they operate on the side of good and the accused is probably guilty of something.<sup>168</sup> But it also can serve to minimize the prosecutor's distress about a wrongful conviction. If the prisoner is guilty of something else, the harm of wrongful imprisonment seems less important and the prosecutor can self-justify it.<sup>169</sup> A striking example of this comes from Linda Fairstein, the lead prosecutor in the "Central Park Jogger" case. Although five African-American teenagers were convicted of the crime, some of whom confessed, another known rapist's DNA matched the semen recovered

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164. See *supra* notes 137–40 and accompanying text.

165. Burke, *supra* note 125, at 187.

166. TAVIS & ARONSON, *supra* note 49, at 132.

167. Burke, *supra* note 126, at 1613 (discussing the effect of cognitive dissonance).

168. See *supra* notes 113–14 and accompanying text.

169. TAVIS & ARONSON, *supra* note 49, at 156 ("Apologize to them? Give them money? Don't be absurd. They got off on a technicality. Oh, the technicality was DNA? Well, they were guilty of something else."); see BAKER, *supra* note 107, at 47 ("At one point I didn't care who went to jail, because everybody was guilty of something." (internal quotation marks omitted)).

from the victim, and the original defendants' convictions were overturned. None of the teenagers mentioned a sixth perpetrator in his confession. Nevertheless, Linda Fairstein claimed that she was still certain of the original suspects' guilt; she suggested that the man whose DNA was found simply finished the attack the teenagers started.<sup>170</sup> In a softball interview with *Jewish Woman* magazine, Fairstein explained,

[F]our of these five men admitted over the years that they attacked others who were assaulted in Central Park that night. It's easy for me to keep a position that I believe is right, so I'm comfortable with the original convictions. Throughout my 30-year career, I've always maintained pride in my integrity. That's why the DA and my colleagues and the court trusted me all those years.<sup>171</sup>

Fairstein combines many aspects of denial in her statement. In addition to having postulated a phantom sixth assailant,<sup>172</sup> she justifies her prosecution of the Central Park Jogger case on the grounds that the young men had committed different crimes that night. That allows her to feel "comfortable" and continue to tout her integrity.<sup>173</sup> Interestingly, this line of thinking with its focus on ultimate karmic fairness—prisoners did something wrong so something bad happened to them—directly conflicts with the legalistic focus on process—the prisoner had a fair trial, so there is nothing to complain of even if the prisoner is

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170. Jeffrey Toobin, *A Prosecutor Speaks Up*, NEW YORKER, Dec. 2, 2002, at 42.

171. Danielle Cantor, *Linda Fairstein*, JEWISH WOMAN, <http://www.jwi.org/Page.aspx?pid=774> (last visited Mar. 14, 2011). It is interesting to compare Fairstein's conclusions with the New York District Attorney's long, analytic, and fair-minded motion to vacate the convictions of the five teenagers. The motion acknowledged the newly discovered evidence and commented extensively on the weakness of the confessions—they were both wrong and contradictory—and the limited utility of the hair evidence introduced. Acknowledging that the teens did commit crimes in Central Park that night, the motion nevertheless casts serious doubt that the teens committed the most heinous crime—the rape of the jogger—and the District Attorney did not believe the trial would have come out the same way with the newly discovered evidence.

172. See *supra* note 62 and accompanying text (referring to the "unindicted co-ejaculator").

173. The case of Roy Criner presents another example of the phenomenon of minimizing the harm of a wrongful conviction because the accused did something else. Criner was convicted of rape and murder. See *supra* notes 66–68 and accompanying text. Criner had allegedly bragged to friends that he had picked up a young female hitchhiker and "had to get rough with her." *Roy Criner*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/74.php> (last visited Mar. 14, 2011) (internal quotation marks omitted). Even when the forensic evidence showed no link between Criner and the victim, the fact that Criner had been boasting about committing a different sexual crime made it easier for the prosecutors and the courts to ignore the problems with the physical evidence surrounding the charged conduct.

innocent. The fact that prosecutors grasp at both explanations indicates something more is going on.

Certain conditions make it easier to admit error, even on the grand scale of a wrongful conviction. It is much easier to admit a mistake if the mistake is not your own but your political predecessor's.<sup>174</sup> Although the system is subject to challenge and embarrassment, the individual's ego and self-image are not. In addition, admitting a mistake may be easier when the DNA evidence points to a known perpetrator because it allows the prosecutor to maintain the self-concept as a person who seeks justice.<sup>175</sup> Finding a substitute—someone who not only committed the crime but also let an innocent person take the rap—makes it easier for the prosecutor to admit a mistake. By identifying the real criminal, the prosecutor does not have to face a mistake that not only deprived an innocent person of liberty but also curtailed the search for the real perpetrator. The prosecutor is still pursuing justice and assisting the victim; the false accusation was merely a bump in the road to achieving a good result that keeps the community safe.

The operation of denial and self-justification explains the seeming oddity that upon exoneration, some prosecutors seem churlish, if not downright vindictive, while the accused is often forgiving and magnanimous. Being willing to apologize necessarily means not being in denial.<sup>176</sup> In contrast, ad hominem attacks on defendants and their counsel signal some psychological anxiety. In the corporate arena, Tedlow advised, "Trash-talking can be a tip-off to denial. . . . If you find

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174. See TAVRIS & ARONSON, *supra* note 49, at 224 ("When district attorneys do actively seek to release an inmate found to be innocent (as opposed to grudgingly accepting a court order to do so), it is usually because, like Robert Morgenthau, who reopened the Central Park Jogger case, and the Sacramento district attorneys who prosecuted Richard Tuite, they were not the original prosecutors and have the power to withstand the heat that such a decision often produces."); Medwed, *supra* note 95, at 160 ("[P]rosecutors may be amenable to a post-conviction innocence claim in situations where the prior conviction occurred during the reign of a previous chief prosecutor . . .").

175. See SCHULZ, *supra* note 55, at 194 ("[I]t's a lot harder to let go of a belief if we don't have a new one to replace it."); Medwed, *supra* note at 95, at 164 ("[P]rosecutors may find accepting the legitimacy of a post-conviction innocence claim . . . where new evidence exculpates the defendant while also *inculpating* another person."); see, e.g., Dee J. Hall, *Wrongly Imprisoned Man on Verge of Exoneration*, WIS. ST. J., May 10, 2010, at A1, available at 2010 WLNR 9811774; cf. *Warney v. Monroe Cnty.*, 587 F.3d 113, 119–20 (2d Cir. 2009) (discussing prosecutors who argued that they used the intervening two months to track down the real killer while the prisoner was not told of his exclusion by DNA as a perpetrator of the crime).

176. Cf. TEDLOW, *supra* note 142, at 183 (describing the corporate reaction to the Tylenol tampering scare in which "throughout the poisoning episode, [the CEO] never attempted to minimize or sugarcoat the suffering of the victims and their families—or, remarkably, his remorse at his company's role, however innocent, in the tragedy"). According to Tedlow, the quick humane response proved crucial to saving the Tylenol brand. *Id.*

yourself trash-talking your competition, take a moment to think about what you're doing. What am I using this derision to hide—perhaps from myself?"<sup>177</sup>

Tavris and Aronson discuss the counterintuitive psychological phenomenon that people are meaner to those to whom they have already been unfair.<sup>178</sup> They point to experiments in which test subjects are instructed to tell the target that they found him "shallow, untrustworthy, and dull."<sup>179</sup> After the test subjects related this unpleasant assessment to the target, they succeeded in convincing themselves that the victim actually deserved their criticism and found him less appealing than they had before they hurt his feelings.<sup>180</sup> In the same vein, Tavris and Aronson explain that prosecutors treat victims of wrongful convictions so harshly because they cannot face their mistake and "every wrongfully imprisoned person is stark, humiliating evidence of how wrong" they have been.<sup>181</sup>

This explains what would otherwise seem like truly bizarre behavior. For instance, despite being exonerated by a panel of judges on North Carolina's Innocence Inquiry Commission, Greg Taylor, who served sixteen years in prison, cannot get his clothes back from the original homicide investigation.<sup>182</sup> Despite the exoneration, police indicate that they want to test what Taylor was wearing for DNA samples—and ironically he begged for that very testing to no avail the entire time he was in prison. The police's inability to let go and admit a mistake is also reflected in the pettiness of their blocking his access to a driver's license.<sup>183</sup> Although such behavior is no less excusable, the theory of denial makes the postconviction conduct more understandable. Those charged with doing justice made a horrific error that is too painful to

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177. *Id.* at 211.

178. TAVRIS & ARONSON, *supra* note 49, at 222.

179. *Id.* at 198.

180. *Id.* at 198–99. The test subjects developed their negative opinion even though they knew that the other student had done nothing to merit their criticism and that they were simply following the experimenter's instruction. *Id.* at 199.

181. *Id.* at 156.

182. Matt Ehlers, *Taylor's Exoneration Prompts Police To Reinvestigate Case*, NEWSOBSERVER.COM (Mar. 17, 2010, 2:20 PM), <http://www.newsobserver.com/2010/03/17/392977/exonerated-taylor-now-feels-hassled.html>.

183. *Id.*

face. Instead, new theories are spun why the exonerated person may still have deserved the punishment he received.<sup>184</sup>

Interestingly, people with strong egos and high self-esteem—people like prosecutors—are most likely to denigrate someone to whom they have already been unfair.<sup>185</sup> Tavis and Aronson explain that it is “people who think the most of themselves who, if they cause someone pain, must convince themselves the other guy is a rat.”<sup>186</sup> The thinking goes like this: “Because terrific guys like me don’t hurt innocent people, that guy must deserve every nasty thing I did to him.”<sup>187</sup> Therefore, “[p]eople will pursue self-destructive courses of action to protect the wisdom of their initial decisions. They will treat people they have hurt even more harshly, because they convince themselves that their victims deserve it.”<sup>188</sup> Tragically, then, prosecutors’ aspirations to do justice and their high opinion of their own goodness and morality prompt the bad treatment of the wrongfully convicted. The notion that the wrong person was imprisoned is so painful and so at odds with the prosecutor’s core self-image that the truth must be denied or at least minimized.

Given the overwhelming pressures on prosecutors, both structural and internal, it is not surprising that denial kicks in when evidence indicates that a prosecutor has wrongfully convicted someone. In fact, rather than marveling at denial, we might instead be more struck by those who are able to face their mistakes.<sup>189</sup>

## V. THE BIGGER PICTURE OF DENIAL

### A. *How Many Innocent Are Incarcerated?*

We are at an interesting historical moment when some innocent people may still be unfairly imprisoned because they were convicted at a time when sophisticated DNA testing was simply not technically available. Many believe, as I do, that we have a moral duty to test available DNA and determine possible innocence. Our justice system, however, will outlast this technological blip.<sup>190</sup> Most criminal defendants

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184. As Tavis and Aronson explain, “So powerful is the need for consonance that when people are forced to look at disconfirming evidence, they will find a way to criticize, distort, or dismiss it so that they can maintain or even strengthen their existing belief.” TAVRIS & ARONSON, *supra* note 49, at 18.

185. *Id.* at 199.

186. *Id.*

187. *Id.*

188. *Id.* at 221.

189. *See id.* at 246.

190. Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 646 (“[T]he era of postconviction DNA exonerations—

today have access to highly accurate DNA testing<sup>191</sup> and, if investigations are conducted properly, our society will eventually run out of people whose innocence can be established postconviction by DNA evidence. This does not, however, mean that we will run out of innocent people.<sup>192</sup> The DNA revolution showed us how easy it is to convict the wrong person and how reluctant the system is to acknowledge even glaring errors.<sup>193</sup>

Even though it is not possible to eradicate false convictions entirely, there are numerous causes of wrongful convictions that we, as a society, can address by focusing our attention and concern—by noticing instead of denying. At least seven predictable situations have generated false accusations in cases of DNA exoneration, and there is no reason to believe these errors do not apply to all types of cases.<sup>194</sup>

First, there is ample evidence in wrongful conviction cases of shoddy police work, which can be infected by laziness, tunnel vision, and cognitive bias.<sup>195</sup> Second, some cases of ultimate exoneration reflect

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the dramatic and public reopening of cases based on clear evidence of actual innocence—will eventually pass.”).

191. *But see supra* notes 84–87 and accompanying text (discussing the case of Ricardo Rachell).

192. *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Mar. 14, 2011) (“For every case that involves DNA, there are thousands that do not.”).

193. *See generally* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007).

194. *See* FINAL REPORT, CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *available at* <http://www.ccfa.org/documents/CCFAJFinalReport.pdf> (discussing eyewitness identification, false confessions, informant testimony, problems with scientific testimony, and attorney misconduct); Ritter, *supra* note 60 (discussing studies examining what evidence originally led to convictions in subsequent cases of exoneration).

195. For example, in one recently reported case, a man charged with a stabbing spent four months in jail begging the police to view the video surveillance cameras, which he knew would exonerate him. Only after his defense attorney had done so was the man freed. His assistant public defender stated: “This wasn’t police work. This was them wanting to close a case.” Scott Daugherty, *Police Arrested Wrong Man in Stabbing*, HOMETOWNANNAPOLIS.COM (May 16, 2010), <http://www.hometownannapolis.com/news/top/2010/05/16-42/Police-arrested-wrong-man-in-stabbing.html?ne=1> (internal quotation marks omitted). In Ricardo Rachell’s case, *see supra* notes 84–87 and accompanying text, the police collected a reference sample of Rachell’s DNA but never processed it and therefore could not compare it to the biological evidence taken from the victim that could have set Rachell free, *see* Roma Khanna et al., *Freed by DNA to Life as an Innocent Man*, HOUS. CHRON., Dec. 13, 2008, at A1, *available at* 2008 WLNR 24028124. The way police conduct lineups can vastly influence identification of a suspect. *See generally* Letter from John F. Farmer, Jr., Attorney General, State of N.J., to New Jersey County Prosecutors, Police Chiefs, and Law Enforcement Chief Executives (Apr. 18, 2001),

prosecutorial misconduct, particularly in failing to hand over exculpatory material or in disclosing deals with or pressure placed on witnesses.<sup>196</sup> Third, defense attorneys contribute to the problem with bad lawyering, conduct that courts sometimes later rehabilitate as “strategy.”<sup>197</sup> Fourth, DNA exonerations highlight the unreliability of eyewitness identification. In fact, incorrect eyewitness identifications from victims and witnesses who are certain, but wrong, are the single most common source of DNA exonerations.<sup>198</sup> Fifth, many of the exonerated made false confessions. A recent white paper, *Police-Induced Confessions: Risk Factors and Recommendations*, identifies the characteristics of those most likely to confess falsely—people who are young, disabled, or have certain psychopathologies—and the types of interrogations likely to induce false confessions—overlong interrogations, false claims by police to possess incriminating evidence, or minimization of the crime or the consequence.<sup>199</sup> If people are willing to confess to capital crimes they did not commit, how many people falsely confess to lesser crimes when there is no DNA

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available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>; Report of the Special Master, *New Jersey v. Henderson*, No. A-8-08 (N.J. 2008), available at [http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20\(00621142\).PDF](http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF) (discussing problems with New Jersey eyewitness identification). Sometimes the police behavior transcends mere callous sloppiness and turns into active subversion of justice. For instance, in the case of William Dillon, his girlfriend was a major witness against him. Dillon was exonerated by DNA evidence. Dillon’s ex-girlfriend, in later recanting her testimony, explained that the police threatened to charge her as an accessory. In addition, it was also revealed that the same star-witness ex-girlfriend had sex with the lead officer in the case during the investigation. *William Dillon*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/1761.php> (last visited Mar. 14, 2011).

196. See generally Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 402–03.

197. See Raeder, *supra* note 129, at 1332 (discussing the high bar set for ineffective assistance of counsel under *Strickland v. Washington*). For example, in the case of Ricardo Rachell, his defense attorney never demanded testing of the DNA evidence that eventually exonerated Rachell. See *supra* notes 84–87 and accompanying text; see generally Sheila Martin Berry, “Bad Lawyering”: How Defense Attorneys Help Convict the Innocent, 30 N. KY. L. REV. 487 (2003); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003); George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25.

198. *The Causes of Wrongful Conviction*, *supra* note 192 (citing “Eyewitness Misidentification” as a contributing cause in 77% of wrongful convictions); see Gross et al., *supra* note 59, at 542 (“The most common cause of wrongful convictions is eyewitness misidentification.”); Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 271, 273–75 (2006) (discussing the American Bar Association House of Delegates’ August 2004 Resolution on Eyewitness Identification Procedures).

199. Kassin et al., *supra* note 72; see Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010) (examining the surprisingly richly detailed false confessions of those exonerated by DNA and proposing reform in police procedures, trial practice, and judicial review).

to disprove their confessions?<sup>200</sup> Sixth, wrongful convictions often rely on bogus informants, particularly jailhouse snitches.<sup>201</sup> Finally, prosecutors have convicted the innocent based on unreliable science.<sup>202</sup>

The seven factors above, often occurring in combination,<sup>203</sup> contribute to convicting the innocent. Because many of the factors that lead to DNA exonerations arise in non-DNA cases, what may seem like a churlish unwillingness to admit a mistake may instead represent resistance to the implications of such exonerations and the much bigger underlying social-justice issues. DNA exonerations present the frightening question: How many innocent people actually are convicted and wrongfully deprived of their liberty? In this respect, the prosecutorial denial of DNA results reflects a greater concern: that the whole system is tainted and that DNA exonerations are merely the small percentage of cases in which we can verify error.<sup>204</sup> One reason that prosecutors resist

200. After a thorough review of the psychological literature, the authors of *Police-Induced Confessions* recommend that all interrogations be videotaped. Kassir et al., *supra* note 72, at 25. Additionally, some false confessions will never come to light because they are the subjects of plea bargains or are disproved before trial. *Id.* at 3.

201. See, e.g., Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413 (2007); Ryan Haggerty, *Man Convicted in 1998 Case To Be Released After DNA Links Another Man to Killing*, MILWAUKEE J. SENTINEL, May 21, 2010, <http://www.jsonline.com/news/crime/94639609.html>.

202. These include myths about how fires start, see Maura Dolan, *A Conviction Up in Smoke? Scientists Say the Evidence for Arson in a Fatal Fire Was Based on False Assumptions*, L.A. TIMES, May 31, 2010, at 1, available at 2010 WLNR 11141539; faulty comparative bullet analysis, see P. Solomon Banda, *FBI Reviewing Techniques After Flawed Colorado Case*, HUFFINGTON POST (Jan. 18, 2010, 9:00 AM), [http://www.huffingtonpost.com/2010/01/18/fbi-reviewing-techniques-\\_n\\_426986.html](http://www.huffingtonpost.com/2010/01/18/fbi-reviewing-techniques-_n_426986.html); unreliable bite-mark evidence; Shelia Byrd, *Dentist Under Fire in 2 Cases—Testimony Linked Bite Marks to Defendants; DNA Exonerated Men*, MEMPHIS COM. APPEAL, Mar. 2, 2008, at 8, available at 2008 WLNR 4231050; and unreliable and over-hyped scent-tracking dogs, see William Dillon, *supra* note 195 (discussing expert who claimed dog could pick up scent after eight days). See generally Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009); Jane Campbell Moriarty, “Misconvictions,” *Science, and the Ministers of Justice*, 86 NEB. L. REV. 1 (2007) (discussing use of forensic evidence and use by prosecutors of unreliable expert witnesses).

203. See Tricia Bishop, *Prosecutors Drop Charges Against Man Convicted in ‘98 City Killing*, BALT. SUN, May 25, 2010, [http://articles.baltimoresun.com/2010-05-25/news/bs-md-charges-dropped-20100525\\_1\\_gunshot-residue-extremely-vexatious-case-jones-case](http://articles.baltimoresun.com/2010-05-25/news/bs-md-charges-dropped-20100525_1_gunshot-residue-extremely-vexatious-case-jones-case) (discussing accused’s case that had “all of the ingredients” of wrongful convictions, including a flawed eyewitness, flawed testimony about the merits of a forensic test, and undisclosed exculpatory evidence).

204. Findley & Scott, *supra* note 129, at 291 (“Because DNA evidence exists in only a small minority of all cases—and is preserved and available for postconviction



admitting mistakes and coming to terms with DNA exonerations is because such exonerations expose deeper problems and deficits in our system. Such exonerations pierce the bubble of denial and thus raise questions about the quality of justice that are too troubling to face.

*B. What Else Do We Fail To Notice About Our Criminal Justice System?*

Strikingly, an overwhelming number of the falsely convicted are African-American or Hispanic.<sup>205</sup> This should come as no big shock, given that Blacks and Hispanics comprise about 62% of American prisoners.<sup>206</sup> An important additional factor in wrongful convictions, as documented by Professor Samuel Gross and his coauthors, concerns the race of the victim who turns out to be White in the majority of cases in which such evidence was available.<sup>207</sup> Mistaken eyewitness testimony is a large contributing factor to wrongful convictions, and the science is clear that cross-racial identifications are particularly error prone.<sup>208</sup> In focusing on innocence, we necessarily must notice who is in jail and therefore confront the effect of the confluence of bias because of the victim's race and faulty cross-racial identification. Those two factors taken together indicate that a disproportionate number of African-Americans and Hispanics may be wrongfully accused.

In *McCleskey v. Kemp*, the Supreme Court held that the racially disproportionate impact in Georgia's death penalty did not demonstrate sufficient cause to overturn the accused's guilty verdict without a showing of a racially "discriminatory purpose."<sup>209</sup> In rejecting the accused's claim, Justice Powell observed:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment, but applies to all

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testing in an even smaller proportion of cases—and because innocence is so very difficult to prove postconviction without DNA, these known exonerations almost surely reflect only the tip of a very large iceberg.”).

205. See Gross et al., *supra* note 59, at 546 (“Over two-thirds of the exonerated defendants we studied were minorities, 55% African Americans and 13% Hispanics.”). In researching this Article, I spent many interesting hours reading the personal stories of the exonerated. Their biographies and photos are available through newspaper reports and webpages, such as the *Innocence Blog* and *Truth in Justice*. See generally Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007).

206. Gross et al., *supra* note 59, at 546.

207. The race of the victim was known “for 75% of the sixty-nine rape exonerations with black defendants, and in 75% of those cases the victim was white.” *Id.* at 547.

208. *State v. Cromedy*, 727 A.2d 457, 461 (N.J. 1999); see Gross et al., *supra* note 59, at 548.

209. 481 U.S. 279, 292 (1987).

penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.<sup>210</sup>

In discussing Justice Powell's argument above, Professor Robert Batey observed, "Rather than ignoring all of the evidence of racism in the administration of criminal justice in the United States, Justice Powell looks it full in the face for three sentences—but then he blinks. He blots the evidence out because it proves to be more than he can bear."<sup>211</sup> As with the DNA evidence, evidence of racial inequities in the death penalty proves too much. If we seriously faced the implications, we would have to reexamine the workings of justice in America.

Instead of squarely confronting racism in the criminal-justice system, we create procedural barriers to noticing its manifestation. One example concerns how the evidence rules protect jury deliberation. Obviously, strong arguments exist in favor of insulating jurors from undue interference and scrutiny, particularly during deliberation.<sup>212</sup> However, Federal Rule of Evidence 606(b),<sup>213</sup> which renders a juror incompetent to testify about deliberation, means that we cannot hear about racism in deliberation and that we, as a society, can pretend that rampant racism is not occurring in the jury room.<sup>214</sup>

210. *Id.* at 314–15 (citations omitted).

211. Robert Batey, *Truth, Justice, and the American Dilemma*, 44 SAN DIEGO L. REV. 517, 520 (2007).

212. As Justice O'Connor explained, "There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Tanner v. United States*, 483 U.S. 107, 120 (1987). The policies disfavoring questioning jurors include the need for finality in a jury trial, the threat of parties harassing jurors after an unfavorable ruling, and the social benefit of having jurors who feel free to speak and act without scrutiny during the deliberation process. *Id.* at 120–21.

213. Federal Rule of Evidence 606(b) provides in relevant part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

FED. R. EVID. 606(b).

214. The jurors lack competency as witnesses—they are literally barred from talking about racism in jury deliberation after the fact. *See, e.g., United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (precluding inquiry into racist statements made during deliberations, including the foreman's insistence that "[w]hen Indians get alcohol, they all get drunk, and that when they get drunk, they get violent").

The practical operation of *Batson*<sup>215</sup> presents another procedural hurdle to noticing racism in the criminal process.<sup>216</sup> Like the Supreme Court's resolution of the claim in *McCleskey*, the focus under *Batson* is not on empirical facts—how many blacks get the death penalty or how many blacks are excluded from the jury—but on prosecutorial motivation. Given what we have seen regarding prosecutorial motivation to win and prosecutors' ability to self-justify and deny, the *Batson* standard seems to invite further denial of racism in the justice system.

## VI. DENIAL'S CHALLENGE AND INSTRUCTION FOR REFORM EFFORTS

Understanding the many complicated and intractable reasons that make prosecutors resist legitimate requests for DNA testing and fail to act—or act quickly enough—on exculpatory DNA evidence is essential if we want to fix the problem. Although many prosecutors have instituted systemic changes to root out false convictions and many have immediately moved quickly to correct the egregious error of wrongful conviction, a significant number have not. Explanations for this intransigence stem from personal concerns, structural reasons, and cognitive biases. Awareness of the operation of denial also contributes to a better understanding of the many complicated factors influencing prosecutors' behavior and points us to some possible solutions.

I observe with admiration at one point in *Serving Justice After Convictions*,<sup>217</sup> Fred hints at the psychological insights into the bases and consequences of denial. He observes, "Freed from binding legal constraints, prosecutors have avoided deep consideration of how their general obligation to serve justice might apply."<sup>218</sup> Note that he suggests that prosecutors have not merely neglected, but they have also avoided. One can neglect a duty or overlook evidence; "avoiding," however, implies that at least at some level, the prosecutor knows there is something from which the prosecutor must distance herself. In Fred's words, prosecutors have avoided "deep consideration." He thereby

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215. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (providing a three-step test for determining whether the prosecutor is using peremptory challenges to make impermissible racially-motivated strikes).

216. See, e.g., *Purkett v. Elem*, 514 U.S. 765, 766 (1995) (describing a prosecutor who struck two black prospective jurors because he said one had long and unkempt hair and the other had a mustache and a goatee). The Court indicated that inquiry should concern the genuineness of explanation, not its reasonableness, which leaves wide latitude for prosecutors to covertly or unconsciously exercise bias. See *id.* at 769.

217. Zacharias, *supra* note 5.

218. *Id.* at 173.

implies that they want to keep the arguments shallow; they are afraid of what plumbing those depths might uncover.

Concomitantly, in *Serving Justice after Convictions*, Fred offered much insightful guidance regarding how we can battle such entrenched denial. Fred knew there was no magic bullet for solving the issue of prosecutorial resistance to cases of postconviction innocence. He was rightfully skeptical of the efficacy of generalized ethical rules. For instance, even with the recent revision of Model Rule of Professional Conduct 3.8, change will be difficult. The revised ethical rules specifically apply to postconviction innocence and postdate Fred's articles.<sup>219</sup> The added language of Model Rule 3.8 provides, "When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted," the prosecutor must "promptly disclose that evidence to an appropriate court or authority."<sup>220</sup> The standard under rule 3.8 requires that the prosecutor "knows," which the *Model Rules* define elsewhere as possessing "actual knowledge of the fact in question."<sup>221</sup> In the report of the ABA Criminal Justice Section recommending the adoption of rule 3.8, the committee stated, "With the understanding that prosecutors should be presumed to take their ethical and professional obligations seriously, the Comment

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219. In 2008, the American Bar Association's House of Delegates adopted additional paragraphs (g) and (h) to the professional ethical obligations of prosecutors under Model Rule 3.8. See AM. BAR ASS'N CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES NO. 105B, at 1 (2008), available at [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html).

220. MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2010). In addition, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor must "promptly disclose that evidence to the defendant unless a court authorizes delay" and "undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit." *Id.* The new rule 3.8(h) provides, "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction." *Id.* R. 3.8(h). The circumstances can elucidate what the prosecutor should know, but actual knowledge is the standard. Wisconsin was the first state to adopt ABA Model Rules 3.8(g) and 3.8(h), which became effective in that state on July 1, 2009. See Roy Simon, *Wisconsin Adopts Slightly Modified ABA Model Rules 3.8(g)-(h) Effective July 1, 2009*, LEGAL ETHICS F. (July 8, 2009, 3:55 PM), <http://www.legalethicsforum.com/blog/2009/07/wisconsin-adopts-slightly-modified-aba-model-rules-38gh-effective-july-1-2009-.html>.

221. MODEL RULES OF PROF'L CONDUCT R. 1.0 (2010). The definition goes on to say, "A person's knowledge may be inferred from circumstances." *Id.*

specifically notes that good faith exercises of judgment are not disciplinary violations under the proposed provisions.”<sup>222</sup>

If nothing else, the mechanism of denial demonstrates how prosecutors can fail to “know” something that seems obvious to the rest of us. The frequency with which prosecutors in good faith delude themselves into believing far-fetched scenarios to dismiss obvious evidence of innocence indicates that focusing on actual knowledge may be fruitless. Furthermore, focusing on professional ethics may have the boomerang effect of leading to more entrenched self-justification. The very obligation and desire to do justice may be a large building block in erecting the prosecutor’s wall of denial. The more dedicated and sincere the prosecutor is in fighting the good fight, the more unconsciously resistant the prosecutor will be to knowing that a prisoner is innocent and the more receptive the prosecutor will be to even absurd alternative hypotheses of guilt. No number of carrots or sticks offered by statute, ethical code, or case law will overcome the deep desire of some prosecutors to believe in the prisoners’ guilt despite all evidence to the contrary.

Aside from low expectations about the efficacy of ethical rules, what implications does the denial explanation of prosecutorial conduct have for designing policy? In *Serving Justice after Convictions*, Fred provided wise and nuanced suggestions. He understood the structural issues,<sup>223</sup> as well as the deeply personal issues, that affect prosecutors’ judgment.<sup>224</sup> Fred’s proposed solutions focused on developing consistent, centrally organized mechanisms for dealing with DNA testing and exonerating results.<sup>225</sup> He recognized the importance of having the changes emerge from and become internalized within the culture of the prosecutor’s office. Fred advocated systemization in the form of designating an experienced decisionmaker who did not play a role in the original prosecution.<sup>226</sup> He proposed that “a prosecutor’s office might

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222. AM. BAR ASS’N CRIMINAL JUSTICE SECTION, *supra* note 219, at 6.

223. Zacharias, *supra* note 5, at 221 (“[P]rosecutors must consider the danger that their own judgment will be particularly clouded because of their conflicts of interest.”).

224. *Id.* at 229 (“[T]o the extent the deficiency in the earlier proceeding was caused in part by an error in the prosecutor’s office, the prosecutor may feel guilty about having to put victims and third parties through another ordeal. Similarly, the earlier prosecution process may have produced a relationship between the prosecutor and the victim or affected third parties that might affect the neutrality of her judgment.”); *id.* at 232 (“[A]ny resolution may be debatable, but a consistent standard of any form has the benefit of avoiding ad hoc decisionmaking by individual prosecutors who have incentives to avoid disclosure.”).

225. *Id.* at 200 (advocating “treat[ing] like cases alike, rather than leaving the decision to the fortuity of which individual prosecutor receives the request for assistance”).

226. *Id.* at 237 (“The decision of whether to reevaluate the previous evidence, allow defendants to conduct DNA tests at their own expense, or treat the matter as closed should not

assign a single prosecutor, or committee of prosecutors, to resolve or participate in deciding these issues, in much the way some law firms now assign in-house ethics specialists to review professional responsibility issues.”<sup>227</sup> This would have the benefit of cultivating expertise as well as allowing the necessary emotional neutrality and distance to enable the responsible individual to analyze the issue dispassionately and to combat cognitive bias, tunnel vision, and denial. Making it someone’s special task to find injustice alters institutional structures that militate against second-guessing prosecutions and redefines what it means to be “a good guy.”

Fred also advocated education about the dangers of wrongful convictions<sup>228</sup> and counseled developing a common practice within the office that “postconviction justice dilemmas be recorded by memorandum and maintained in a centralized location. This kind of recorded history can provide what currently is missing in the literature: cases and commentary regarding the issues. Over time, shared wisdom will develop.”<sup>229</sup>

At the very least, the original prosecutor and the original office must be taken out of the equation entirely.<sup>230</sup> Given that some prosecutors will not accede to the obvious implications of DNA exonerations, it is fair to suppose that when the evidence of innocence is less scientific, prosecutors will be even more resistant to exoneration. Therefore, systematized responses and the involvement of neutral ombudsmen,

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depend on the happenstance of whether an individual prosecutor is openminded or resistant to a new result.”).

227. *Id.* at 238.

228. *Id.* (“[P]rosecutors’ offices should highlight postconviction justice issues in their manuals and administrative guidelines.”); *see also* Findley & Scott, *supra* note 129, at 374 (discussing education and training).

229. Zacharias, *supra* note 5, at 239. The only recent suggestion that Fred did not think of involves an overt attempt to combat entrenched cognitive biases by encouraging prosecutors to designate a devil’s advocate and debate the evidence. *See* Findley & Scott, *supra* note 129, at 389 (suggesting a devil’s advocate type of debate in the prosecutor’s office to make sure counter arguments are not overlooked); Burke, *supra* note 126, at 1620.

230. *See* Medwed, *supra* note 95, at 175 (suggesting ways to mitigate the conflict of interest when a prosecutor is given the task of reviewing his own work or the work of a coequal colleague in the office); *see also* Gene Warner & Matt Gryta, *Sedita Style Takes Hold in DA’s Office*, BUFFALO NEWS, Jan. 15, 2009, at B1, *available at* 2009 WLNR 849470 (quoting a new prosecutor who promised, “If there is sufficient and credible evidence to exonerate a person, I will assign a senior prosecutor—and not the [original] prosecutor—to investigate it and report to me”).

such as innocence commissions that focus on individual exoneration<sup>231</sup> or prosecutorial self-regulatory commissions run by special outside departments<sup>232</sup> present the best hopes for reform. We owe Fred a debt of gratitude and our admiration for his careful analysis, far-reaching insights, and proposed resolution of this vital public policy issue. Our entire system of justice has some harsh truths to face in confronting the odd and troubling procedures, attitudes, and outcomes surrounding prosecutorial denial of DNA exoneration.

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231. Innocence commissions bring together prosecutors, defenders, victims, and members of the public whose sole job is to investigate claims of innocence dispassionately. See *Criminal Justice Reform Commissions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Innocence-Commissions.php> (last visited Jan. 11, 2011) (advocating such commissions and noting their work in North Carolina, Pennsylvania, California, Connecticut, and Wisconsin). One problem with the commissions is that most of them are aimed at systemic reforms and do not review individual cases. See Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI. KENT L. REV. 89 (2010). So far only North Carolina has done so. See generally, Jerome M. Maiatico, Note, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345 (2007). However, the North Carolina commission restricts its inquiry to claims of actual innocence. See Roach, *supra*, at 101.

232. See Raeder, *supra* note 201, at 1417 (advocating that prosecutors create their own self-regulatory commissions for reviewing individual cases of wrongful convictions, which would “reinforce the ethical obligation of prosecutors as ministers of justice and provide a friendly forum to address the underlying causes of erroneous convictions”). Raeder continues, “Hopefully, these reviews would lessen the knee-jerk hostility that many prosecutors hold toward innocence commissions, because they fear ‘witch hunts’ directed to unmask evidence of their wrongdoing.” *Id.* at 1417–18. See also Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010) (advocating a formalized system of safeguards for tracking and reducing errors and for spotting areas in need of reform, run as a program division of the prosecutor’s office).